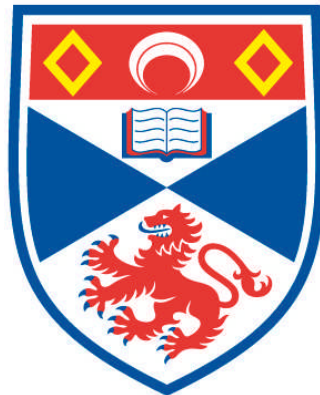


ON RIGHTS AND DEMANDS : HOW THEORISTS OF RIGHTS CAN BENEFIT FROM TAKING DEMANDS SERIOUSLY

Kin Ting Ho

**A Thesis Submitted for the Degree of PhD
at the
University of St Andrews**



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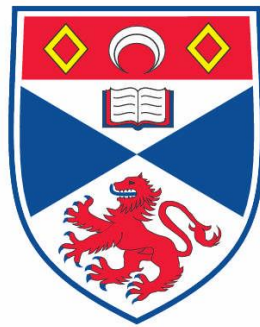
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On Rights and Demands: How Theorists of Rights Can Benefit from Taking Demands Seriously

Kin Ting Ho



This thesis is submitted in partial fulfilment for the degree of PhD
at the
University of St Andrews

25th February 2014

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I, Kin Ting Ho, hereby certify that this thesis, which is approximately 77000 words in length, has been written by me, that it is the record of work carried out by me and that it has not been submitted in any previous application for a higher degree.

I was admitted as a research student in February, 2010 and as a candidate for the degree of Doctor of Philosophy in February, 2010; the higher study for which this is a record was carried out in the University of St Andrews and the University of Stirling between 2010 and 2014.

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To Mum & Dad

Whose love and support made everything worthwhile

Acknowledgments

I must first thank my parents. Without them none of this is possible. Their support, from disruptively many timezones away, has been tremendous in all sorts of ways. In a culture that defines your worth in terms of your earning abilities, to give your child your blessing to pursue a doctorate in philosophy is one of the most liberating things a parent can do. Love, reverence and gratitude are mere brute approximations of what I owe them.

Engaging, encouraging and enlightening, Dr Rowan Cruft is the sort of supervisor that I didn't know exists. Supervision sessions throughout all these years were something I looked forward to with excitement, not dreaded. The confidence he has in me, however unjustified or exaggerated, is what kept me going till the bitter end. I once feared that my entire PhD project would end up being a very long footnote to his work, although now I realise even if it had been the case, I would have been a proud author of that note.

Dr Simon Hope has never officially been my supervisor, but he has been most generous with his time when I needed help, which has been more than often. Chapter 5, in its entirety, is inspired by and owes its existence to him. For what it is worth, I regard his interpretation of Onora O'Neill's work as the best there is.

I have the good fortune of finding lifelong friendships in my academic siblings. Dr Ambrose Yuk Kong Lee—who also happens to be the best flatmate in any possible world—and Dr Yann Allard-Tremblay have been most supportive, and I have learnt so much from them, both philosophically and otherwise.

Many more friends in Scotland have helped me come this far. I thank Alexander Stathopoulos for his consistent, sometimes mischievous and hence elevated, humour and wit, David Silverman for his company and his generosity with his whisky collection, Bihotz Barrenetxea for the daily dose of optimism she brings to the National Library, Mikko Lehkoinen for all those movies and cheap wine we shared, Sarah Henderson for her always spot-on advice regarding all inter-personal matters, Simon Payne and Patrick McDevitt for not talking about football in my presence, Bren Markey for reading part of the thesis, Prof Antony Duff and Prof Sandra Marshall for their kindness and acute appreciation of my baking skills, Dr Ben Saunders and Dr Kent Hurtig for their philosophical stimulations, Dr Eloise Harding for her duck-themed gifts, Nikki Leavitt-Callander for her efficiency in all things administrative, and the Stirling Philosophy Department as a whole for its dedication to make its graduate students feel included and supported.

Closer to home, my old friends have been an inalienable part of my mental

well-being ever since I left Hong Kong; maintaining friendships across continents is never easy, but they have more than conquered the geographical barrier. I thank Yenson She for simply always being there for me whenever I needed a true, old friend, Lawson Lai for taking me into his confidence and allowing me into his exclusive inner world, Sandy Leung for her compassionate heart and the unbreakable mutual trust that holds us together.

And then there are those who you cannot even categorise geographically; I thank Dr Jason Tsang, an alarmingly clever man, for forcing me to reflect on my left-leaning tendencies every now and then, and Joseph Ho, my childhood playmate, for re-fostering our friendship after decades of having drifted apart.

Finally, I thank Dr Stephen Lancaster for sustaining my sanity during the final stages of my studies, and for his constant reminder that life is so much more than a PhD.

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"There is nothing which, generally speaking, elevates and sustains the human spirit more than the idea of rights. There is something great and virile in the idea of rights which removes from any request its suppliant character, and places the one who claims it on the same level as the one who grants it."

Alexis de Tocqueville

"'No, not at all,' said K., 'I want no favour from the castle. I want my rights.'"

Kafka, *The Castle*

Abstract

This thesis explores the normative significance of making a rights-backed, authorized demand as a right holder. Rights, I argue, enable their holders to make a special kind of demand which comes with a special force. It is, in other words, one of rights' *functions* that they are demands-enabling.

I single out what sort of demands I am interested in exploring. I also look at how these special demands are normatively significant. I call them rights-backed, authorized demands. They are normatively significant, first, because of the interesting role they play in other agents' practical-reasoning, and, second, because the very making of these demands, as a matter of rights, is empowering in an abstract way.

I go on to contrast my view with other 'demand theories' in existence and conclude that my view is substantively different. In particular, existing demand theories of rights all fail to sufficiently highlight the importance of *actual* demands, and instead focus on the 'status' of 'being in a position' to make demands. I argue that this focus is a fundamental mistake.

I also consider how my view can contribute to some related literature on rights. First, I argue that my view highlights a new function which rights have: it has interesting implications on the shape of the long-standing debate between the will and interest theory of rights. Second, I argue that my view provides us with a new way to counter one of the most discussed criticisms of the existence of welfare human rights, which is the argument that rights must correlate with some specific duties as a necessary existence condition, and that human welfare rights fail on this mark. I conclude that if human rights indeed have a demand-related function as I argue, it weakens the intuitive appeal of this criticism.

Introduction

1 Preview of Part I

This thesis begins with an urge to further an underdeveloped aspect I feel present in the contemporary literature on rights: the role of demands. What lies behind this urge is a strong conviction that there is something special about rights that cannot be captured by anything other than what rights do for us as right holders in supporting, in some yet-to-be-specified sense, our making demands on others. The presumed special feature associated with rights can be fleshed out by considering the following example. Imagine a man bellowing the following to a group of picnic-goers or campers regarding their use of an open field. 'Get off here! Don't ever come back uninvited! You are not welcome!' Here we have a man issuing a demand to a collection of people, and I take it that it is not controversial to assume what force this claim has depends, among other things, on whether the man in question has a right (probably a 'property right' in this case) to the open field. If he is indeed the owner of the field, his demand that the picnic-goers or campers be gone seems to have a sort of significance that it wouldn't otherwise have had. This sense of difference between the two cases (i.e. a rights-backed vs. a non-rights-backed demand) is all I am asking my readers to grant me at the start of this thesis.

However, when one surveys the literature, one is struck by a sense of lack of proper respect to this point. There are, of course, exceptions, and in this thesis we will look at these exceptions in detail. But the mere fact that they are exceptions rather than the norm suggests more has to be done to give this insight regarding the connection between rights and demand its proper due, and I see my thesis as a contribution to this end.

Our journey, at least in the contemporary literature, begins with Joel Feinberg's insight on the value of rights (1970). Rights, Feinberg claims, are valuable because they are useful pieces of moral furniture. Standing on our rights, we, as right holders,

make claims on others with a kind of force that is otherwise absent. With rights, we demand things as equals. Right holders do not beg or request things being done. Rather, they *demand* things being done with a special force.

Feinberg's story captures the conviction I have in mind: what is special about rights is that as a right holder, there is something special about the demands one makes *in that capacity*. The man in our previous example, if he was a right holder, would not be merely *requesting* or *begging* the picnic-goers to leave; he, standing on his rights, demands them to do so *with a certain yet-to-be-specified force*.

This initial starting point of the thesis is, I assume, not particularly controversial, but it requires much unpacking. Many questions can be raised at this point: What are these demands that the account refers to? What is the notion of 'demand' being invoked? What, substantively, is the difference between demands backed up by rights and those that are not? What about right holders who do not (or cannot) make these demands? Do demands capture *all* that is special about rights?

In Part I of my thesis, I attempt to answer these questions. I will further develop what I shall call in this thesis 'Feinberg's insight' (Section 2, Chapter 1) in such a way that a demand theory of rights (of sorts) can be properly incorporated into the contemporary debate on rights.

In the introduction, I want to briefly outline my position regarding rights and demands which, I think, is true to Feinberg's insight. Here are a few claims that are central to my view:

First, the difference between a demand that is authorized and backed up by rights and those that are not is significant. This is what makes the right holder's demand special: it is not just any demand one ordinarily makes. Spelling out how special this demand is brings us to the second claim.

Second, I want to claim that in the standard cases, demands backed up by rights, when made, create special reasons for actions. What I mean is that as a right holder, when I demand you to do something, ϕ -ing, say, about my right, you have acquired a special reason for ϕ -ing on top of the set of reasons you (may) have for or against ϕ -ing *prior to* my demanding. Furthermore, the reason you thereby come to acquire is there *in virtue of* my act of demanding; the demand in question being a 'rights-backed, authorized' demand, as I shall explain. Making sense of this claim brings me to the contemporary debate over practical reasoning. In particular, I will be drawing from Stephen Darwall's and David Enoch's work to substantiate my claim that a *distinct* reason has been given when a demand is made. Enoch's own work, for example, makes a case for what he calls 'robust reason-giving'—to be distinguished from 'epistemic reason-giving' and 'merely triggering reason-giving'—which is a kind of reason giving that captures what is going on when requests or commands are made. I will conclude that there is nothing mysterious about this act of reason giving. In Darwall's words (2001), the will is (or at least can be) a source of reasons.

Third, I want to make a *prima facie* counter-intuitive claim about the prerequisite of a demand, authorized or not, being made. I want to claim that it is not necessarily the case that a demand has indeed been made *only if* the demand is clearly addressed to someone specifically. In other words, I argue that it is an error to maintain that a demand cannot be made *unless* it is *specified to whom* the demand is against; it is far more natural to think that the opposite is true. The justification of this line of argument is that it matches how demands are actually made in our daily discourses. This is important when I explain the implications of my account at the end of the thesis when we start thinking about the philosophical account of human rights. Note that when a rights-backed, authorized demand is made against some unspecified others, distinct reasons for action being given to this collection of agents might be something we find difficult to comprehend; I shall address this issue in

Section 6.3, 6.4, Chapter 5. I shall call this the ‘openness’ of demands. I will also say something about how common I take this feature to be; put briefly, while I do not think it is the most common or ordinary case of a demand if it is open in the way we just discussed, I nonetheless find these demands to be genuine. I will return to this point later.

In the course of spelling out these features of my account, I will make frequent reference to Stephen Darwall's work on the second-personal standpoint, which contains an outline of, or at least hints at, a theory of rights bearing a certain resemblance to what I want to defend. But the similarities between my account and Darwall's are, I must stress, superficial, and reading too much into how the two views are similar risks missing the whole point of my project. In particular, I must highlight upfront that Darwall wants to make the power or specialness of the rights-backed, authorized demand rest not after all on its being *actually* made, but in some mysterious sense on its *being prone* to being made: a line I fundamentally reject. He also seems to want to block one of my central points, i.e. that demands can be made without having specified addressees of the demand. I will dismiss Darwall's position by spelling out how a lot of it is influenced by his larger philosophical projects which, when thinking about rights in particular, should not concern us much.

I will also contrast my position on the relationship between demands and rights with John Skorupski's, who *defines* rights via what he calls ‘*permissible demands*’. I argue that he has a rather strange use of the notion of demands, one that seems to make it do too much work. The hope is these comparative analyses sufficiently distance my position from the other so-called demand theories already on offer.

Two qualifications

Before we move on to the preview of Part II, let me add two clarificatory points

concerning the scope of my argument. *First*, I do not mean to suggest that *all* instances of rights share *all* the above features. My argument is a lot more modest. As will become obvious later in the thesis, I want to argue that this so-called demand feature of rights is at least true of some instances of rights; it is because of this, however, that I do maintain that in understanding our concept of rights in general, this feature should be properly studied. But this, I hope I have made clear, is a different claim from saying that every single right has to be understood through the concept of demand and its relationship with rights.

Second, although my main focus will be on moral rights, I consider my arguments in this thesis to be of importance to our understanding of legal rights as well. The demand feature of rights, especially when we flesh out the normative implications thereof in terms of reason-giving, seems most naturally at home in the philosophical discussion of moral rights. However, I do believe that it can also tell us something insightful about our understanding of legal rights; there will be some subtle differences in the case of legal rights, and I will return to this point briefly, but unfortunately due to the limitation of scope, this will not be a prime concern here.

2 Preview of Part II

With this newly enriched understanding of rights, we move on to Part II of my thesis. This part of the thesis is an attempt to make the account of rights defended in Part I relevant to the contemporary debate on rights. What I chiefly have in mind is the long-standing debate between the will theory and the interest theory of rights.

The literature is, needless to say, vast. Therefore, some care must be exercised in selecting what materials I shall deal with. In Part II, I will first outline what the debate is about, and suggest there is a way that my account of rights, with its heavy

emphasis on the notion of demand, has some potentially important contribution to make. Here in the introduction, I will give only a sketchy overview of the debate. After the overview, I will suggest here in the introduction in what way my account of rights can make a contribution to this debate.

The standard debate in the literature of rights has been dominated by two rival accounts, commonly known as the will theory and the interest theory. Simply put, they are opposing accounts trying to give the best set of conditions under which someone holds a right.¹ Standardly, these accounts both take the following form: 'X is a right holder of the right R if (and only if)...' Sometimes, this is also known as the debate over the 'existence condition' of rights. The debate is construed as a disagreement over under what conditions would X be a right holder to a right R (or under what conditions would X's R 'exist').

The will theorists, with Hillel Steiner among the most famous of them, think that rights are about the *control* the right holder has over a set of normative relations; having this control is both necessary and sufficient for someone being a right holder. The interest theorists, on the other hand, reject these conditions. An interest theorist typically holds that rights are, in some sense, about the *interests* of the right holder. A commonly accepted formulation of the interest theory of rights holds that it is sufficient for X to be a right holder when X's 'sufficiently important' interests are served by the right. I will have a lot more to say about this reading of the shape of the debate. In particular, I will argue that it is not always that clear what the debate between the will and interest theory is actually about: there are, I propose, two different readings on this point. But a full exposition will have to wait. See Section 1

¹ Except when one starts getting deeper into the literature and one realises it is not as simple as this. More on this later.

& 2, Chapter 4 of this thesis.

That this debate is in deadlock is a common enough feeling among those involved in the debate. But a diagnosis of the deadlock is still something up for grabs. One suggestion is that the debate has been in deadlock because, as Leif Wenar insightfully points out, both the will theory and the interest theory generate counter-intuitive conclusions that philosophers from the opposite camp deem fatal—and, unfortunately for both of the camps, correctly so. The will theory for example is notoriously difficult to be squared with inalienable rights: it is not clear how it is possible that, if having a right is to have the control over the normative relations surrounding the right, anyone can have a right against slavery *without being able to waive it*. In other words, it is not clear how a will theorist can say anyone can have a right against slavery at all, which most people take to be ‘inalienable’. The interest theory, on the other hand, seems to have a hard time solving the problem of specifying what constitutes sufficient interest: without this, the claim that X has a right when X's sufficiently important interest is served by the right is viciously empty; as Wenar might have put it (2008), the interest theorist is in effect something like the following: X has a right whenever X's interests are served by having the right, except when in cases where they don't. (He wrote of the interest theory: ‘It is unlikely that the best theory takes the form: ‘All rights have feature F (except for those that lack feature F)’ (p.257)).

As an attempt to try to get pass this deadlock, I will follow an emerging consensus in the literature, most notably in the writings of Wenar and Gopal Sreenivasan, who both proposed alternatives to these rival theories. They both argue that the standstill between these two theories is not satisfactory, and the only sensible way forward is to have an account of rights that can accommodate elements from both of the will and interest theory. It is in that spirit that I conclude the introductory and stage-setting part of Part II and start exploring how the debate can move forward.

To proceed, I partially follow Wenar's methodology in endorsing the 'multi-function theory' of rights (or as Wenar himself calls it: 'several function'). Put crudely, the multi-function theory of rights holds, contra the will theory and interest theory, that there is more than one 'thing' that rights do. In Wenar's language, that is to say that rights serve more than one function. I will spend some time in the thesis unpacking this notion of *function*—admittedly, that 'rights have functions' is a strange claim to accept on face value. Yet, I shall argue, there is also a sense that it is quite natural to think about rights this way: perhaps all that the function-talk is trying to capture is merely the intuitive sense that these rights are *doing something for their holders*. We may then accept that in this sense, rights do have functions, without embracing something overly absurd.²

What I shall then go on to claim is that it is one of the normative functions of rights that rights authorize demands (in the sense argued for in Part I of my thesis). Recognizing that this is a function of rights, in what way does my claim impact the shape of the current debate?

Sceptically, one might want to say there is nothing groundbreakingly new here—authorization is indeed one of Wenar's own proposed functions of rights (2005), and, therefore, one might be tempted to say that all I have done in the second part of my thesis is at best *enriching* something Wenar has already established elsewhere. But I don't think this is a fair way to see my contribution in the debate, because I think the account I have been sketching is actually quite different from Wenar's own characterization of authorization. Now, it will take me longer than what this introduction allows to spell out what the differences are between my use of authorization and Wenar's use of it to support my rejection of

² I shall also suggest a way to translate the function-talk about rights into something about the 'values' of rights in case some of my readers remain unconvinced that rights can indeed have functions.

the option as outlined at the beginning of this paragraph, but with the risk of oversimplification, let me say the following. Wenar's own understanding of rights' functions is bound up with something known as 'Hohfeldian incidents'—which are a set of normative relations between a right holder and a duty bearer which in some sense constitute the 'building blocks of rights'. I will say more about this at the end of the introduction and elsewhere in my thesis, but for the present purpose this outline should suffice. The main difference between my view and Wenar's is this: Wenar's understanding of *authorization* as a function of rights is identified with some particular combinations of incidents in the Hohfeldian framework—an identification I seek to reject. I will argue that there is nothing to gain and possibly quite a lot to lose by so restricting our understanding of rights' authorization of demands made by the right holders. I will explain why that is so in the thesis.

3 Preview of Part III

The final part, Part III, of my thesis looks at the implication of my account defended in Part I concerning the debate on human rights. I am having in mind the kind of criticism against the human rights discourse Onora O'Neill developed³. Her criticism against the human rights discourse is primarily that a certain class of what is usually taken as human rights, i.e. 'rights to goods and services', are not *genuinely* human rights, or human rights *proper*. They are not (human) rights proper because these less-than-genuine rights, the argument goes, do not have counterpart obligations. That is, when we say X has a purported right to, say, education, it is not clear at all, unless some relevant institution is in place, *who* has to do *what* as a counterpart obligation of the right. Furthermore, having a counterpart obligation in the sense

³ Mainly in (O'Neill, 1996). For further references to O'Neill, see Chapter 5 of this thesis.

just explained is held to be a *necessary condition* of these purported rights to count as genuine rights. Hence, it follows that it is almost an error, according to O'Neill, to speak of any human rights to goods and services, since these *human* rights should not be something contingent upon the existence of an institutional setting, given these rights, by their very nature, are supposedly possessed by all humans in virtue of their humanity.

There have already been some attempts in the literature to counter O'Neill's scepticism, and I shall examine them in greater depth (Section 4, Chapter 5). But I think they are all inadequate, and if what I defend in Part I of the thesis has any bite at all, I think I can make a contribution in that debate by furthering the criticisms against her.

My strategy is as follows. To start with, O'Neill wants to claim that we can't say there is a human right to an adequate standard of healthcare because it is not specifiable who has a duty to do what corresponding to the purported right. Given it is a necessary condition for there being a right for these (the corresponding duty bearer and the content of the duty) to be specifiable, we should therefore reject these rights to goods and services, including a human right to an adequate standard of healthcare, as rights proper. A more-thorough-than-usual (that is, compared to the treatment O'Neill's argument gets in the literature) analysis of the reason behind her endorsement of the necessary condition of the existence of rights seems necessary at this stage for my rejection of her requirement to be meaningful. For O'Neill, her fundamental concern about the class of human rights she calls rights to goods and services is that these rights, given that their corresponding obligations are left 'dangling in the air', therefore fail to guide agents in their practical reasoning. The thought is that these purported rights to goods and services, in virtue of not being correlated with duties, are *empty* as far as everyone else is concerned; no one specially is under any obligations to do anything in virtue of these rights, and,

therefore, these rights cannot enter other people's practical deliberation: these rights to goods and services fail to be *action-guiding*.

My reply is crudely that it is not clear why rights have to be action-guiding in the way that O'Neill thinks necessary. Given the widely accepted usage of the language of rights that seems to run against this idea, it would appear the burden of proof is on her to show that that is true. I also urge a return to thinking about in what ways do rights matter normatively, i.e. what functions we think of rights as having. As mentioned, O'Neill's own view on this matter seems to be that rights *must be* action-guiding, and rights to goods and services fail in precisely that regard: given the very nature that their duty-bearers and the content of the corresponding duties are not specifiable, these so-called rights to goods and services cannot be action-guiding and hence cannot qualify as rights. But one of rights' functions, so the central point of the thesis goes, is that a right could perform some other function as well: they can authorize the right holder to make a special kind of demand regarding one's rights. And it is, at least it appears to me, obviously the case that rights to goods and services, e.g. a human right to adequate standard of healthcare, *can* perform this function of authorizing the holder of such rights to make authorized demands: *even if* there are not specific bearers of duties corresponding to these rights. This at least gives us a good reason to be hesitant about accepting O'Neill's requirement on rights' existence: assuming that a human right to an adequate standard of healthcare does perform the function as outlined, do we really want to say it is nonetheless not a right proper because the counterpart duty bearers and content are not specifiable?

This argument will, of course, be pursued in far greater depth in Chapter 5. In particular, much effort will be spent on understanding what, exactly, the function that these human rights to goods and services have is. I will address these in the final few sections of Chapter 5.

4 The extra: (Up)setting the Hohfeldian table

This is not, technically, part of the introduction—at least not in the sense that this corresponds to, and acts as a preview of, a specific part of the thesis. Nonetheless it is very important that I make some methodological remarks at this stage about the so-called Hohfeldian analysis of rights.

I might have already caused considerable alarm by being so light on Hohfeld thus far. It is, indeed, somewhat a convention to do the opposite in the literature: most books and articles on rights begin with a lengthy section on Hohfeld's famous logical structure of rights.⁴ The relative absence of Hohfeldian analyses in this thesis is a deliberate attempt to break away from that practice. And in line with the convention of breaking away from conventions, it seems it is I who must justify my decision. I shall attempt to do that presently. But before I can do that, let me briefly examine the basics of Hohfeld.

So what is the Hohfeldian analysis? The Hohfeldian idiom is the *de facto lingua franca* in the contemporary literature on rights, with its origin in Wesley Hohfeld's writing. While precisely how it should be used to facilitate our discussion of rights (and theories about them) is disputable⁵, there is a rather strong consensus on what the Hohfeldian analysis *is*.

The core of the Hohfeldian analysis is made up of a cluster of interrelated claims, which everyone takes to be something we inherit from Hohfeld himself. The first

⁴ Notable examples of this convention include Kramer (1998), Wenar (2005, 2008), and Jones (1994).

⁵ More on this in Part II.

two claims we need for our exposition are:

- (1) X has a **claim** against Y that Y φ s iff Y has a **duty** to X to φ .⁶
- (2) X has a **liberty** (privilege) against Y to φ iff X does not have a **duty** to Y not to φ .⁷

Thus, these 'Hohfeldian incidents' (claims, duties, liberties) are inter-defined through a series of entailment claims. These are what is known as first-order Hohfeldian incidents, on which a set of second-order incidents will be built.

Rowan Cruft (2004) makes a helpful observation regarding how to understand these incidents. He claims that the notion of 'duty' cannot be further fleshed out within the Hohfeldian framework. It just has to be grasped outwith the Hohfeldian system. What he means is that given these incidents are inter-defined, in order to begin to get a grip on these incidents, it is helpful to remember that a duty is something we can, and have to, grasp from outside the system. Seen this way, we can then make

⁶ There are some complications surrounding how to read the 'to' locution: whether it ought to be read as 'owed to' or 'towards'. I will come back to this in Part II of my thesis.

⁷ I avoid talking about a Hohfeldian incident called 'no-claim' as much as I can—it is very difficult, I think, to have a firm grasp of the concept of a no-claim. Nothing in my thesis depends on there being a definition for no-claim; but for the sake of completeness I will list two more definitions that are integral to the Hohfeldian language here:

- (3) X has a **liberty** (privilege) against Y to φ iff Y has a **no-claim** to X that X not φ s.
- (4) X has a **claim** against Y that Y φ s iff X does not have a **no-claim** against Y to that Y φ s.

Note that (4) seems rather bizarre: it is not clear at all what (4) adds to the discussion.

sense of what, e.g., a claim is through (1) against a duty, which we grasp intuitively.⁸

The next four Hohfeldian incidents we need in order to complete the exposition are powers, liabilities, immunities and disabilities. While the relationship among these second-order claims, much like the relationships among the first-order ones, are also to be understood with a cluster of entailment claims (see (6) to (9) below), these second-order incidents themselves have to be understood with reference to first-order Hohfeldian incidents. The first thing we need to know is that second-order Hohfeldian incidents are about first-order Hohfeldian incidents. (They can be about second-order incidents themselves too, but I will leave that discussion for now.) So, e.g., a Hohfeldian power is a power over claims, duties, liabilities or no-claims. A power can be understood as:

(5) X has a **power** iff X can create or remove some first-order Hohfeldian incidents.

Note that a Hohfeldian power has to be understood via some pre-theoretical understanding of ability (Curft, 2004). The reason is that there is no amount of Hohfeldian analysis that can inform us about what the 'can' locution is in (5). The thought that someone can create or remove some first-order Hohfeldian incidents has to be grasped outwith the Hohfeldian framework.

But once we know what a Hohfeldian power is, we can start from there to understand all the other second-order Hohfeldian incidents, much like we did with duties vis-a-vis the first-order incidents. First, a liability. A Hohfeldian power and a Hohfeldian liability are—in a way that is similar to the relationship between a claim and a duty—inter-definable as follows:

⁸ See Cruft(2004), especially p350-1

(6) X has a **power** against Y to create or remove Y's claim, duty, liberty or no-claim iff Y has a **liability** to X regarding Y's own claim, duty, liberty or no-claim.

The last two Hohfeldian incidents, immunities and disabilities, can be likewise understood against power and liability.

(7) X has a **disability** against Y to create or remove Y's claim, duty, liberty or no-claim iff X does not have a power to create or remove Y's claim, duty, liberty or no-claim.

(8) X has an **immunity** against Y's creating or removing X's claim, duty, liberty or no-claim iff X does not have a liability to have a claim, duty, liberty or no-claim created or removed by Y.

Finally, immunity and disabilities are inter-definable as follows:

(9) X has an **immunity** against Y's creation or removal of X's claim, duty, liberty or no-claim iff Y has a **disability** to create or remove X's claim, duty, liberty or no-claim.

As we shall see, the interconnected Hohfeldian framework, encapsulated from (1) to (9), are the basic tools (what has been known as the 'Hohfeldian incidents') that most theorists use to analyse rights and—more pertinent to our discussion in Part II—also to analyse theories about rights.

Having this system at hand doesn't by itself give me a reason to engage with it. Of course, insofar as I want to engage with the contemporary literature on rights at all I cannot avoid speaking the Hohfeldian jargon. (And indeed, I should be doing quite a lot of that in Chapter 4.) But I will limit myself to just that. For example, I do not wish

to have a lengthy discussion on whether my account is an account of claim-rights or rights that cover some more of Hohfeld's incidents. In particular, what I want to resist is for my discussion of rights to be *constrained* by the Hohfeldian incidents. These so-called incidents should be something we map up to once we are done with our analysis of rights, not something we start with from the ground up.

More systematically put, the worry I have is threefold; the first two are intimately related. The first aspect of the problem is that sticking to the Hohfeldian analysis allows the possibility of, or even encourages, the discussion about whether a particular theory is about a *claim-right* or *right*—a point that we will see leads to *all* sorts of confusion in Chapter 4. Now this sort of debate is of course acceptable if it helps us in understanding what *rights* are: after all, we are all ultimately interested in a theory of *rights*, not of *claim-rights per se*. But that this sort of debate is helpful in this way is precisely what is not clear. It is, I claim, not apparent that having a theory of claim-rights is useful, or that having a discussion about whether certain debates in the literature are actually about rights or claim-rights helps our ultimate quest—it is, I think, a distraction. Those who are more Hohfeldian-minded would most probably find my assertion absurd: they might want to argue that, actually, a theory of claim-right is singularly instrumental in our understanding of rights. One way in which a study of claim-rights is relevant is that, somehow, we come to the conclusion that all rights do have a regular relationship with Hohfeldian claim-rights, for example. Then, perhaps, it is not conceivable that having a theory of claim-rights—and also first having the meta-discussion about whether a particular strand of theory in the literature is a theory of rights or of claim-rights—can be rendered relevant in answering the ultimate question. But it is doubtful whether this line is tenable, as the following paragraph shows. This leads me directly to the second point.

Secondly—and this is a worry that grows out of the first—it is not clear how helpful

it is to have an elaborate Hohfeldian system if we don't actually have a settled view on how different Hohfeldian 'incidents' come together to constitute, or even relate to, a right. This worry is not new; it has been articulated, somewhat differently but convincingly, in Cruft (2006). Cruft makes two (very plausible, in my view) assertions: a) not all rights are, or contain, claims, and b) not all claims, privileges, powers, immunities and liabilities are, or constitute, rights. Regarding a), most theorists would agree that rights can be a cluster of Hohfeldian incidents, and some may actually not including a claim-right, e.g. a ship captain's authority to make orders on his ship might be a pure power-right that does not contain a claim-right.⁹ In fact, we can easily see why *merely* having a claim-right is a very pointless way of having 'rights', since your claim-right, if not accompanied by a relevant immunity about that claim-right, can simply be changed since some other people would have the power to annul your claim-right. Regarding b), suppose you have a duty to your mother to do something, so, given the Hohfeldian framework, your mother has a claim-right against you: but it still remains I think an open question whether we can or want to call this claim a right.

Given a) and b), any credible theory of rights relying on the Hohfeldian framework, I think, would have to accept that rights are one, or a cluster of, incidents within the framework, but, importantly, there isn't any one incident—not even a Hohfeldian claim—that all rights must contain, nor is it true that all incidents could form a right.¹⁰ That much most theorists in the literature agree (except for those who think the only kind of theory of right can be given are theories of claim-rights). But the really interesting question is 'why': Why isn't there any one incident that all rights must contain?

⁹ Example taken from Wenar (2011)

¹⁰ This speaks in favour of my conclusion of the previous paragraph.

Unfortunately, Cruft doesn't offer an answer; his aim is mainly to articulate the question, even though he has tried out a number of possible replies before rejecting them. Yet, if this question remains unanswered, it instantly becomes mysterious why we are still reliant upon the Hohfeldian framework in our quest of a theory of *rights* (not a theory of claim-rights) at all. The Hohfeldian framework generates a lot of new questions that we wouldn't have had to ask if we had not sided with the Hohfeldian analysis in the first place: case in point, the sort of question addressed by Cruft's article. One indeed wonders why most contemporary theorists of rights remains slaves to the Hohfeldian master.¹¹

Thirdly, there is a further, and potentially more damning, worry that goes beyond the previous two points. The full force of this objection cannot be appreciated before I have presented my arguments in Part III; so for now, I will be brief and flag it up that I shall return to this point. This third worry about the Hohfeldian approach goes beyond the previous two criticisms in that the previous arguments in some sense grant the assumption that the Hohfeldian incidents *do* capture all rights.¹² In other words, in making the previous critiques of the Hohfeldian approach, I have kept untouched the presupposition that all rights can in fact be captured by the Hohfeldian analysis. Even the second point I made relying on Cruft's argument does not challenge this assumption. It merely asks: *assuming* we accept that all rights can indeed be captured by a Hohfeldian analysis, if we don't actually know how the Hohfeldian incidents relate to or constitute rights, what good is conducting a Hohfeldian analysis of rights?

¹¹ Wenar's theory of rights about functions might be a lifeline for Hohfeldians here. I think it articulates an excellent insight, but falls short of defending the Hohfeldian-analysis. I will come back to that in Section 3 & 4, Chapter 4.

¹² Wenar is singularly the most committed person to this position I have met. Wenar asserts that all rights can be analyzed in Hohfeldian terms. See Wenar (2005), especially the page leading to fn. 16.

The present third worry goes beyond Cruft's worry. It emphatically aims at questioning the point of the Hohfeldian analysis by highlighting the possibility that there are rights that cannot be captured by the Hohfeldian language. My claim is that it is possible that there are in fact rights which a Hohfeldian lens obscures. How strong this possibility is depends partly on how one reads my argument in Part III (also, less forcefully, in Part II)—this is where I have to leave it vague at the moment. But whether my arguments later on succeeds, I am content to wrap up the current discussion here by noting the existence of this possibility, which I find hard to deny *a priori*. That is, there might just be rights that no matter how hard we try to put together some combinations of Hohfeldian incidents, we simply cannot get them to look like a right.

And finally, as a supplement to all the criticisms above, let us not forget that it is categorically not the case that the Hohfeldian framework has always been *necessary* in conducting an analysis of rights: Mill's famous definition of rights, e.g., makes no reference to Hohfeld—for the obvious reason that it predates Hohfeld. Thus, I think a Hohfeldian framework should at best *supplement* rather than dictate our analysis of rights. Therefore, when necessary, I will make references to Hohfeld, but this thesis will be relatively Hohfeld-light.

Part I

Rights, Demands, and Authorized, Rights-Backed Demands

Chapter 1

The fundamental idea behind my thesis stems from Joel Feinberg's view on rights. In this chapter, I am going to look at what Feinberg thinks about rights, and I will conclude that the act of *claiming*, or what I call *demanding*, seems to be the core of his view on rights. To get a flavour of what I am hinting at here, Feinberg thinks '... it is claiming that gives rights their special moral significance.' (1970, p.252) As indicated in the introduction, much of my thesis can be viewed as an attempt to unpack this thought. But it must also be stressed that there are also significant differences between my view and Feinberg's. Later in this chapter (Section 3) I will go on to explain why, despite the differences, it is still useful to rest my argument on Feinberg's insight. This chapter aims at giving a detailed analysis of Feinberg's view on rights, something curiously absent in the more contemporary literature on rights. It paves the way to a more mature and developed theory of rights later on.

1 Cornerstone: The story of the farmer

Let us begin with a story. Suppose a farmer owns a piece of land in the Scottish Highlands; the land is just off a popular hiking trail. The land is well-sheltered from strong winds, so hikers quite frequently camp there for the night throughout the hiking season. Let us assume too that the farmer has been trying to grow crops, probably barley, on the land, and that the campers who camp there have been behaving 'irresponsibly', and so on.¹³ Imagine one early morning, the farmer arrives to work on his land. To his dismay, he sees again a group of campers. Suppose he is

¹³ The detail does not matter, the point of the further assumption is just so we can rule out the kind of complications arising out of the right to access according to Land Reform (Scotland) Act 2003 regarding the campers' right to use the land: the Act gives the public the right to access the farmer's land for certain purposes (e.g. recreation) under certain conditions (e.g. 'responsibly').

agitated and declares, 'Get lost! You are not welcome here. This is my land.' How should we read this demand? In particular, does the demand actually *matter*? To abstract away a little, what I am getting at here is the following question regarding the *exercise* of rights: when someone makes a request as a right holder about something concerning her rights, *does the request matter*? Are we content with saying that the demand is superfluous, that its being made has no impact normatively whatsoever?

Now, some people, who I disagree with, might find it intuitive to say that demands made by right holders in a manner similar to the farmer's simply do *not* matter normatively. Their reasoning is likely to be as follows: whatever others should, or have reason to, do regarding the right holder and his piece of land *remains the same regardless of* whether the right holder makes any sort of request or demand; whether the campers in the previous example should camp there or not is *independent of* whether the farmer so demanded—had the farmer remained silent, what they should do remains identical. In other words, this view sees this form of exercising of one's rights as *superfluous*: in making demands as a right holder, what is being done is, at best, an act of epistemic highlighting and, in virtue of that, does not actually matter normatively.

What I want to highlight here at the beginning of my thesis is the intuition that the farmer's demand, or any other demands similarly made by a right holder concerning the content of her right, *do matter*. I will, of course, return to talking about why the view expressed above—the view that the demands simply do not matter—is wrong (Cf Section 2, Chapter 2). But I will hold back until I have sketched a picture of *why* and *how* I think demands of this sort matter; making sense of how they matter is going to be the point of Part I of my thesis.

2 Feinberg's insight

Joel Feinberg, I want to argue, recognises this. He recognises that there *is* a normative point here to the demands being made.

Feinberg's famous article, 'The Nature and Value of Rights', begins with a thought experiment that involves a world called 'Nowheresville' (1970). It is 'a world very much like our own except that no one, or hardly anyone (the qualification is not important), has *rights*' (p.243). The point of Nowheresville is that no matter how many 'moral concepts and practices', as Feinberg calls them, you allow into Nowheresville, it is never going to be, as it were, *good enough* until rights are restored. What Feinberg allows in Nowheresville include beneficence, duties, personal desert, and what he calls 'a monopoly of rights', by which he means we can allow the notion of 'rights' in Nowheresville insofar as the 'rights' are only held by someone *centrally*, hence 'monopoly'. (To help us understand what he means by a monopoly of rights, Feinberg urges us to consider Hobbes's *Leviathan* (1651, Ch.21). Feinberg reminds us of the normative relations between the subjects, the Sovereign and God according to Hobbes: one can say there are duties that the Sovereign has towards his subjects, but they are not *owed to* his subjects: only God can be wronged by the Sovereign's mistakes *regarding* his subjects. Thus, in Feinberg's language, only God can be said to have a (monopoly of) right, assuming rights track 'directed duties', i.e. duties that are *owed to* someone.)¹⁴

The point of the thought experiment is meant to show that there is something amiss

¹⁴ It is of interest to note there are those who think we do not need to venture into the realm of the imaginary to make sense of a world without rights—'Rights are so common in our world that we might suppose that they are woven into the very fabric of human existence. But there have been worlds without rights. The conventional wisdom is that neither the ancient Greeks nor the ancient Romans possessed the concept of a right' (Jones, 1994, p.1).

in a world without rights; that 'something', according to Feinberg, must be what is valuable about rights.

So why are rights valuable? Why do we have a sense of something being amiss thinking about Nowheresville? Feinberg's answer is that in Nowheresville, no act of *claiming* is possible:

Nowheresvillians, even when they are discriminated against invidiously, or left without the things they need, or otherwise badly treated, do not think to leap to their feet and make righteous demands against one another, though they may not hesitate to resort to force and trickery to get what they want. They have no notion of rights, so they do not have a notion of what is their due; *hence they do not claim* before they take (1970, p.249. Emphasis mine).

But if claiming is what is valuable about rights, it seems natural to ask Feinberg for an explanation of, first, what exactly the relationship between rights and claiming is and, second, why and how claiming makes rights valuable.

Unfortunately, the first question is not answerable in any straightforward way. As Feinberg explains:

As we shall see, a right *is* a kind of claim, and a claim is "an assertion of right," so that a formal definition of either notion in terms of the other will not get us very far. Thus if a "formal definition" of the usual philosophical sort is what we are after, the game is over before it has begun, and we can say that the concept of a right is a "simple, undefinable, unanalysable primitive" (1970, p.250).

Now, no matter what one makes of this kind of approach in philosophy, it remains true that it is unlikely we can give a clear and concise account of what Feinberg thinks about the relationship between rights and claims. But answering the second

question above, i.e. looking at how claiming makes rights valuable, we might get a better grasp of the relationship between the rights and claims indirectly. Feinberg's answer to the second question is, in a nutshell, this:

Even if there are conceivable circumstances in which one would admit rights diffidently, there is no doubt that their *characteristic use* and that *for which they are distinctively well suited*, is to be claimed, demanded, affirmed, insisted upon. *They are especially sturdy objects to "stand upon," a most useful sort of moral furniture.* Having rights, of course, makes claiming possible; but it is claiming that gives rights their special moral significance. This feature of rights is connected in a way with the customary rhetoric about what it is to be human being. Having rights enables us to "stand up like man," to look others in the eye, and to feel in some fundamental way the equal of anyone. To think of oneself as the holder of rights is not to be unduly but properly proud, to have that minimal self-respect that is necessary to be worthy of the love and esteem of others... Not all of this can be packed into a definition of "rights," but these are *facts* about the possession of rights that argue well their supreme moral importance (1970, p.252).

What Feinberg wants to highlight here is what rights can *do* for their holders—and, *in virtue of that*, why rights are valuable. The language of the metaphor in the quoted passage is clearly suggesting some 'use' or 'function' of rights: by describing the rights as a 'useful sort of moral furniture', Feinberg draws attention of the point of rights as being something that *helps* or *benefits* the right holder in some normative sense. And the use or function of rights is clearly how they, in some sense, make possible or enable claims. (The idea that rights have *functions* is going to be discussed in Section 3.1, Chapter 3.)

Notice also how claiming is clearly an *act* in Feinberg's way of using it. To 'stand upon' rights—a metaphor for the act of claiming—is clearly something that the

right holder *does* (indeed, elsewhere he writes: '...claiming is an elaborate sort of rule-governed *activity*' (1970, p.250. Emphasis original)). It is this sense of claiming and its relation to rights that is going to be the principal focus of this thesis.

Let us pause here and take stock. In the above short exposition Feinberg has made some important remarks concerning rights and claims, as summarized below:

Rights are valuable, and they are so (partly) because they make possible, or enable, 'claiming' in some yet-to-be-specified sense. 'Claiming' in this context is to be understood as an *act*—something that the right holder *does*. To make claims in this way is significant, morally or normatively speaking. I shall refer to these points collectively as *Feinberg's insight* hereafter.

3 What I am *not* taking from Feinberg

Before I go on to refine and develop Feinberg's insight, it is important to distance myself from Feinberg's view where appropriate. The most important point I want to stress is that Feinberg appears to hold a principle of correlation between rights and duties with which I disagree. A right, according to Feinberg, is correlative to duties *necessarily*. The correlation can be spelt out as follows: it is a necessary condition for a person, X, to have a right to ϕ that, first, the right to ϕ is a right *against* some other person or persons specifically and, second, that person or those persons has or have a duty regarding X's ϕ -ing, and, third, this duty is owed to X.

This is of course the dominant view in the literature, but let us put that aside for the moment and focus on Feinberg's own reasoning. Feinberg's reasoning, if I am not mistaken, is that, a), we can only have rights if we can make claims about them, b), claims must be against 'particular someone', therefore, c), rights must correlate with duties whose bearers are precisely the 'particular someone' that (b) refers to. Or, to put the same point differently, Feinberg doesn't think one can have a right without it being correlated to some duties whose bearers are precisely those we can make

claims against.

But by accepting Feinberg's insight, I do not think it is necessary for us to accept everything he thinks about rights. What I see myself as inheriting from Feinberg does not include the principle of correlation between rights and duties; all I am taking on board is what I have previously labelled Feinberg's insight. The reasons for my reservation about Feinberg's reasoning will become clear, as I will in effect make a case against b). (See Section 6-7, Chapter 5.)

But now, before I pursue that line, my opponents might wish to challenge me at the outset: is it possible to accept Feinberg's insight without also committing oneself to the principle of correlation between rights and duties that Feinberg holds? After all, when Feinberg claims rights are valuable in the way he describes, he has in mind these rights being *essentially* connected to duties—that is, a conception of rights that holds rights and duties are correlated. Can I, in good faith, reject the correlation between rights and duties while taking Feinberg's insight regarding the value of rights on board?

While I understand the worry here, I think it is entirely reasonable for me to reject the principle of correlation between rights and duties *while* retaining Feinberg's insight on the value of rights. To understand why, we need to look at what Feinberg says about 'manifesto rights'. By carefully considering Feinberg's treatment of these so-called manifesto rights, I think we can conclude that it is not against the spirit of Feinberg's view to elucidate the value and importance of rights via how rights support claims being made *even in cases of manifesto rights that don't fulfill the principle of correlation*.

First thing first. What are manifesto rights? I believe it was Feinberg himself who coined the term. (Both Peter Jones (1994, p.164) and Onora O'Neill (1996, p.132) cite Feinberg in their discussion of manifesto rights.) These are 'rights' that,

according to Feinberg, don't qualify as *genuine* rights: but, somehow, they are *worthy of the name* of rights. For example, advocates of universal human rights are likely to maintain that they are indeed speaking of someone having a right to certain goods or services *regardless of* whether the rights being discussed are correlative to some duties of others¹⁵. Feinberg, as we have seen, should have every reason to say that these rights are not, properly speaking, rights. Yet, very importantly, Feinberg concedes that, for some to-be-specified reasons, advocates of these rights are to be 'forgiven'. What is the reasoning behind this attitude?

Feinberg explains,

...I have a certain sympathy with the manifesto writers, and I am even willing to speak of a special "manifesto sense" of "right," in which a right need not be correlated with another's duty. Natural needs are real claims if only upon hypothetical future beings not yet in existence. *I accept the moral principle that to have an unfulfilled need is to have a kind of claim against the world, even if against no one in particular.* A natural need for some good as such, like a natural desert, is always a reason in support of a claim to that good. A person in need, then, is always "in a position" to make a claim, even when there is no one in the corresponding position to do anything about it. Such claims, based on need alone, are "permanent possibilities of rights," the natural seed from which rights grow. When manifesto writers speak of them as if already actual rights, they are easily forgiven, for this is but a powerful way of expressing the conviction that they ought to be recognized by states here and now as potential rights and consequently as determinants of *present* aspirations and guides to *present* policies. That usage, I think, is a valid exercise of rhetorical license (1970, p.255. Most of the emphasis mine).

¹⁵ E.g., see (Nickel, 2013).

What we witness here I think is the tension Feinberg feels between two modes, or senses, of thinking about rights. The first mode, the more 'orthodox' view he originally subscribes to, takes some conceptual connection very seriously, to the effect that for some person, X, to be a right holder, X's right must, necessarily, have a conceptual connection to someone's having some duties owed to X—otherwise, it is not a right at all, properly speaking. Feinberg's second mode of thinking about rights appears to be very different. There, precisely in cases where the principle of correlation doesn't hold, when the 'rights' in question are not rights proper according to the first mode of thinking, Feinberg discusses his 'sympathy' towards accepting those 'rights' as rights in the passage quoted above. The precise reason for Feinberg's sympathy is a bit unclear (one plausible reading is that the language of rights is, as a matter of empirical or political fact, powerful in practical terms and this powerfulness justifies this conceptual leeway), but insofar as Feinberg retains his language of talking about these manifesto rights in close association with claims—even *when these manifesto rights are 'claims against no one in particular'*—I think it isn't far fetched to argue that Feinberg should not, after all, resist cashing out what the value of rights is, even in cases where these so-called manifesto rights do not meet the principle of correlation, via how they support or enable claims. In other words, *given Feinberg's description of manifesto rights that they are claims against no one in particular*, I don't think it is entirely at odds with Feinberg's thinking about rights to extend his insights to cover 'rights' that do not fulfill the principle of correlation. One way of looking at the point of Part III of this thesis is indeed to make sense of exactly how such an extension is possible: by arguing that rights do, in fact, back authorized demands their holders make *against some unspecified others*.

Here I hope I have put my opponent's mind at ease. The original worry with which this section begins is that I am relying on Feinberg's insight about rights in bad faith. Feinberg uses a specific conception of rights in his writing; it might be objected that for me to appropriate his thoughts on rights and apply them where Feinberg would

not approve of is a dubious and disingenuous move. Through highlighting Feinberg's views on what he calls manifesto rights, I hope I have shown that it is indeed not in bad faith that I propose to extend where his insight on rights and claiming might apply. What I am proposing to do, after all, is what Feinberg comes very close to endorsing outright. By continuing to use the language of claims in the case of manifesto rights, even making it absolutely clear that he is talking about claims that are against no one in particular, Feinberg virtually suggests himself that the importance of claiming in understanding the value of rights should extend to cases where the principle of correlation does not hold.

4 Stepping back from Feinberg's insight: Returning to the cornerstone

Before I move onto the next chapter, I want to break the dialectic briefly to reiterate a point I made in section 1—it is important to make the point again now that we have looked at what Feinberg has to say about rights and claims. The extensive analysis of Feinberg's view given above establishes that Feinberg indeed has something interesting and important to say about rights, which—a point I shall return to and justify later—I claim curiously doesn't get fully recognised in the contemporary debate over rights. But now, before we move away from Feinberg in the second half of this chapter, I want to make it clear what the cornerstone of this thesis is.

While I am greatly indebted to Feinberg's insight about the value of rights being their enabling or authorizing of right holders' demands or claims, I want to make it clear that the root of the intuition motivating this thesis goes deeper than his insight. What I am trying to invoke here is a simple recognition of the point underlying the initial story I began this chapter with: when a right holder, like the farmer in our story, makes a claim or demand about the content of her right, the claim or demand *matters*. The point I want to make absolutely clear here is that even if my readers are sceptical of Feinberg's *characterisation* of the normative phenomenon of this

special kind of demanding (e.g. perhaps one might find the language of 'making claims', or rights being 'useful moral furniture', and so on, unappealing), it matters not. All that is required at this point is that one finds the story of the farmer, and my characterisation of what goes on there, plausible.

Of course, recognising that this is a mundane point doesn't make the task of unpacking it any easier. A string of questions immediately spring to mind, even if one grants me the intuition: what normative work can the act of demanding do? These acts of demanding—are they not merely doing some epistemic work, as in highlighting the fact (which is independent of the making of the demand) that there are reasons to do so and so regarding the right holder? Or does the demand actually do more substantive work in terms of practical reasoning in bringing about new practical reasons? Answering these questions takes us to the next chapter.

5 Conclusion

In this chapter I have made an attempt to refocus the discussion on rights, laying the foundation for my later claims. I wanted to begin somewhere simple: I wanted to start with an intuitive thought that there is something important about *claims* or *demands*, through which rights can be understood. That was the aim of Section 1. In Section 2, I explained how Feinberg's insight goes hand-in-hand with the fundamental intuition with which this thesis begins. Section 3 and 4 dealt with some potential objections at this early stage: the former answered the worry that I am relying on Feinberg's work in bad faith, whereas the latter was a plea to those who do not share Feinberg's insight to stay on board.

Chapter 2

In this chapter, I want to carefully spell out and develop my so-called ‘demand theory of rights’—a label which I tentatively use, but shall stay away from subsequently; it shall be clear why I choose to do so. What I take to be the cornerstone of this view has already been explained: Following Feinberg’s lead, I argue that a very important feature of rights is their connection to the demands that right holders make, which I take to be an insight that any plausible account of rights must respect. To this end, I will defend a number of central claims.

First, under the view I favour, an account of rights that respects the connection between rights and demands does not focus on just *any* instance of demands. I will draw a set of distinctions between demands and ‘authorized’ demands on the one hand and demands and ‘rights-backed demands’ on the other to help pin down what exactly I am after. I will also make it clear that I am not committed to the implausible view that for *every* demand made, the demander is *ipso facto* a right holder. (Section 1)

Second, I want to tease out how the appropriate sort of demands matters under my account. This is going to be a contentious point. The crux of my argument here is that a rights-backed demand is standardly normatively important in a way that is ‘practical’; bringing in Stephen Darwall’s and David Enoch’s discussion on practical reasoning, I will put forward a rather bold claim: when certain conditions are met, demands give rise to a *distinct* reason for action. This is against how most people—among them most notably R. Jay Wallace, who we will come to in a minute—tend to think about reason-giving, for they want to maintain that, at best, demanding things from people serves an ‘epistemic’ purpose, as in merely ‘highlighting’ reasons for an action that are obtain independently of the making of the demand. I will explain in more detail what their objections amount to and argue

for the opposite. (Sections 2-6)

Third, I want to make a case for the claim that a rights-backed, authorized demand can be made against an *unspecified party* or a *vague collection of agents*. What I mean is just that it seems it is not a necessary requirement for a demand to be made that the demand is aimed at some specific individual or individuals. Although not the most natural sounding thought, this should be clear once we reflect on how the concept of a demand is ordinarily used. If successful, this will result in a radical scenario where a right holder can make a rights-backed demand (in what Feinberg calls the 'manifesto' sense) against *no one in particular*—this turns out to have important implications in the contemporary debate on human rights, to which we shall return in Chapter 5.

I will go through these claims one by one. Let us begin with the first claim.

1 A study in demands

1.1 The central case of demands

People make demands against each other all the time. A teacher's bellowing of 'keep quiet!' to his class is a demand. A random youngster stopping you in the middle of the night asking you for cigarettes is also issuing a demand. However, what I, together with other 'demand theorists', are concerned with isn't just any kind of demand. What we are interested in is the sort of demand that is encapsulated by the story told in Chapter 1: the story of the farmer, being the rightful owner of a piece of land, *demanding* some campers be gone. It is this type of what I shall call 'rights-backed, authorized' demand that I take to be the subject of concern in giving an account of rights.

But what is so special about this type of demand? Before we move on to this special kind of demand, we might benefit from thinking about what, in the most basic and natural sense, a demand is. Let us then start with the mundane. The central case of a

demand, I take it, is the act of stating an imperative in which the performer of the act makes explicit i) what he wants done and ii) the fact that he wants it done. So, a robber can demand you to hand over your money (though probably not permissibly so), a student can equally demand their lecturers to make lecture notes accessible to everyone in the course, and a parent can demand her children to respect her authority, etc. *Note that to say someone is making a demand does NOT imply anything normative or evaluative:* there is no evaluation of the appropriateness of the act involved. To say that someone is demanding something does not amount to an endorsement of the authority or even moral permissibility of the demander; thus when a reporter speaks of a group of Somali pirates' *demand* for ransom, I take it no judgment on the appropriateness or permissibility of the action of the pirates is at all implied. (More on why this is important later in this Section.)

For my purpose I am also not concerned about cases of a demand being made under some obscure circumstances, potentially challenging the criteria for the central case of demand. For example, one might think a father, by merely pointing a finger towards the direction of the door, looking into the eyes of his son can be thought of as demanding that his son should leave the room; yet one could perhaps question whether his action satisfies i) and ii). (One may think for example his intention has to be 'inferred', or that his stating of the fact that he wants something done is 'uncertain', and so on.) I don't think this type of cases poses a problem—at any rate, they do not seem like the most prominent way for a right holder to make demands about her rights. I am therefore content to just accept that the boundaries of the sort of act I am picking out might be fuzzy around the edges and leave it at that.

I am also side-stepping another kind of complication at this stage regarding further clarification on how the concept of 'demand' is distinguished from or related to other notions like 'command' or 'request'. The complication is supposed to be that these notions are close neighbours, and the criteria I listed above for what a demand

is do not distinguish it sufficiently from its neighbouring concepts. There might indeed be subtle differences between these ideas. Commands, for example, seem more natural in the context of recognised and established authority: nothing captures that usage like the fallen-out-of-fashion 'command theory of law' so thoroughly rubbished by HLA Hart, which holds that laws are the 'commands' issued by a sovereign. Requests, on the other hand, seem to be more natural in contexts where obedience is not expected or required—you may fill a request to a bank asking for a loan even if you are unsure whether you will be given one, or you can request the help of some passerby knowing there is no legitimate ground for complaint when your plea is ignored. (These demands might be 'permissible' but not 'backed by rights'—a distinction I will say more about in Chapter 3 when I distance myself from Skorupski's view.)

But I don't think much hinges on arguments about how closely related (or not) demands are with these neighbouring concepts. Recall the criteria underlying the central case of demand that I have previously outlined: and *that* is the kind of phenomenon I am trying to capture. If one finds, say, we have a similar set of criteria in picking out 'commands', that is fine—I do not see how that constitutes a problem. At this point, any dispute over the label I apply remains more or less verbal.

My interest here though, it is important to remember, does not just include any demand, but only a special kind of demands that is linked to, or backed up by, rights. What it means is that it is a kind of demands that, when made, the demands make an 'appeal' to the right. One can say this is a kind of demand that is *backed up by rights*. But what exactly is the difference between this kind of demand and just any ordinary demand?

Imagine a robber demanding you to hand over your money. There is, and I hope this is not controversial, nothing in this demand itself that forbids you to just ignore it. Of

course, if the robber is also pointing a gun to your head, you may feel *compelled* or *coerced* to do as you are told—but these reactions are plainly not triggered by the demand itself. Under those circumstances, your consideration will more likely be self-preservation or other reasons that have nothing to do with the ‘normative force’ of the demand. (This is supported by our intuition on a strange robbery case: here the robber is not threatening the victim at all in any way; he just walks into, say, a shop and demands money. I don't think there is any doubt in this case that we would say there is no reason whatsoever to pay any attention to this demand.)

But consider a case in which it is not the robber who demands you to hand over your money. There is someone you have promised to, or have signed a contract such that you have a legal obligation to, give money to. (I take it that in this case the other person has a right that you give her the money—if anyone can ever have a right at all.) And if the promisee makes a demand *that is backed up by the right*, it seems intuitive to say that you cannot ignore his demand the same way you ignored the demand of the robber. With this controlled thought experiment, the distinction between the two examples becomes clear: while you can just ignore a demand, you cannot in similar ways just ignore this special kind of demand which is backed up by a right. It is the difference in force of this kind of special demand that we are interested in exploring in this thesis.

We might benefit here from pausing slightly to give this special kind of demand a name, since it will be a constant point of reference for my subsequent arguments. As I have already been using the label before, I am going to call this kind of demand *rights-backed, authorized demands*. A rights-backed, authorized demand comes with a force that goes beyond an ordinary demand; a rights-backed, authorized demands also standardly creates a yet-to-be-discussed kind of practical reason on others, which explains the intuition that there is something ‘special’ about this kind of

demands.¹⁶

1.2 Rights-backed, authorized demands vs. *non*-rights-backed, authorized demands

A few more words on the choice of words regarding the label—as the naming of the label ('rights-backed, authorized demands') suggests, there are two things being picked out. To explain my choice of words, let me begin by fleshing out two distinctions.

We can, firstly, distinguish between rights-backed and non-rights-backed demands. I think this is a rather simple and intuitive distinction: when a robber demands you to hand over your money, his demand can hardly be said to be backed up by rights. On the contrary, when the farmer from our previous story makes a demand about his land, his demand is backed up by his rights. I take it that much sounds uncontroversial. The second distinction underlying the naming of the label is a bit

¹⁶ In this thesis I will focus my investigation of the relationship between rights and demands on rights-backed, authorized demands that are made by the holder of the right. I have left open the possibility that *your* right could perhaps back up *my* demand when my demand is, really, about *you*.

Although I see no reason to rule this possibility out, I think to fully understand this feature requires some additional analyses. The reservation is explained by the fact that there seems to be cases where we *do* and *don't*, respectively, think that rights can enable some other parties to make rights-backed, authorized demands on the right holder's behalf. An example of the former cases could be any fundamental human rights; people in the west staging protests about violations of human rights of some unknown individual on a different continent seems perfectly legitimate. On the other hand, had I made a purportedly rights-backed, authorized demand on behalf of my neighbour's right to his weekly bin-collection against the local council, I would sound outright nosy. More work has to be done before we can propose a principled way of demarcating the two kinds of cases; and before that is done, I think it is premature to speculate on whether *everything* here we say will equally apply in both cases.

trickier. It is the distinction between authorized and unauthorized demands. By authorized demands, I mean these demands have a special sort of force—precisely the sort of force that distinguishes the demand of the farmer and the demand of a robber, and will be spelt out more in the coming sections. But, one might wonder, isn't that the very point of drawing the distinction between rights-backed and non-rights-backed demands anyway? The answer is a qualified 'yes'. To see why a two-fold distinction is, after all, necessary for theoretical reasons, we need to appreciate that it is possible that being rights-backed is not the only way a demand can be authorized. In other words, we have no *a priori* reason to assume that the rights-backed vs. non-rights-backed distinction matches up neatly to the authorized vs. non-authorized distinction.

One might think, for example, there are certain interpersonal relations among which the talk of rights is not appropriate, despite the fact that these relationships do serve a similar function of 'authorizing demands'. Consider the case of friendship. One might think to flesh out the normative relationships one has with one's friends in terms of rights is to miss the point of friendships entirely. So, one then goes on to conclude, not implausibly, that there are no relations of rights among true friendships; one can never hold rights against one's friends in the name of friendships. However, among friends, one might still want to say there is a scope for *authorized, though not rights-backed, demands* to be made, in the name of friendships. Thus, the idea that there can be authorized but non-rights-backed demands, on reflection, shouldn't strike us as absurd.

Now this is just, as I stressed, one way of looking at things. Whether one is tempted to think it is true is entirely predicated upon the wider scope of the moral system. Conversely, it is also plausible that one thinks a rights-backed demand is really special, so special that it is unmatched by any other way in that rights-backed demands are authorized in a unique and incomparable way, so there is *no scope for*

authorized, though non-rights-backed, demands to be made. While this might sound radical, on reflection, that appears to be Feinberg's own thought in proposing the thought experiment of Nowheresville in the first place (as discussed at in Chapter 1). The very point of that thought experiment, recall, is that one can imagine a world in which rights are absent, and—no matter how many other moral concepts or practices you then allow back into this imaginary world—as long as rights are kept out of it, something will be amiss. Feinberg's diagnosis is that what goes amiss is *precisely* the lack of the act of, and standing for, claiming or demanding with this special, irreplaceable backing. And importantly, for Feinberg, to say that friends can make authorized demands on each other entails that they have rights against each other. This is supported by the view Feinberg holds, already discussed in Section 2, Chapter 1, where he makes the connection between a right and a claim closely connected and irreducibly primitive. Given this backdrop, it doesn't seem implausible to suggest that Feinberg holds that for a demand to be 'authorized', that it is 'rights-backed' is the only possible way. And if this is true, perhaps there is not much scope for non-rights-backed, authorized demands after all. I will refrain from getting too deep into whether Feinberg himself really is committed to the existence of *non-rights-backed, authorized demands*—I am confident about my reading, but my aim here is merely to show that it is not completely mad to think that this particular class of demands (i.e. authorized, though non-rights-backed demands) might be an empty set.

What this shows is that whether one thinks one needs to make a two-fold distinction such that there are rights-backed, authorized demands and non-rights-backed, authorized demands depends a lot on whether authorization of demands can be achieved without rights. Both are perfectly legitimate views to hold. But in any case, all I am interested in is rights-backed, authorized demands in this thesis. And given my awareness of the issues raised in this subsection, I am going to use the label of rights-backed, authorized demands to mark what I am interested in throughout my

thesis.

Now, onto the second claim of this chapter.

2 David Enoch and robust reason-giving

Now that we have a better grasp of what type of demands I am focusing on, we can move on to unpacking the yet-to-be-explained claim from the previous chapter: that these demands *matter normatively*. This is cashed out by thinking about the second main claim of this chapter I listed earlier on. To reiterate, what we are trying to unpack here is how the demand made by the farmer in our previous story matters; in such a case, when the farmer is a right holder, making demands or claims on others regarding his property, how do we understand these—to use the language just explained—rights-backed, authorized demands?

Here I want to bring in the recent work of David Enoch on practical reasoning to help articulate my point. Enoch argues that there are (at least) three kinds of reason-giving (Enoch, 2011). They are: epistemic reason-giving, merely triggering reason-giving and robust reason-giving. I will first explain the differences among these types of reason-givings, followed by a rather lengthy but essential discussion of how the distinctions are relevant to our current discussion.

Cases of epistemic reason-giving include instances of reason-giving where no reason has been ‘added’ by the very act of reason-giving. In Enoch’s own words, these reasons are ones whose existence is independent of the act of the giving of these reasons. For example, if you ask me why you should mind your language in a café on a Sunday morning while we are having brunch, when I reply, ‘why, there are children around!’ I am not in fact *adding* any new reason for you to mind your language. I am merely pointing out that there are children around, in case you hadn’t noticed, and that there are children around is itself a reason for you to mind your

language independently of my pointing it out. Here, Enoch would say it is an instance of epistemic reason-giving: the giving of the reason merely 'highlights' some facts that would obtain regardless of, and independent from, the giving of the reason.

Alternatively, 'merely triggering reason-giving' (the second kind of reason-giving in Enoch's classification) includes cases where the act of reason-giving doesn't create a new reason in a 'radical' way. It is a case of reason-giving by changing the non-normative circumstances and, thereby, making a 'dormant' reason apply—as it were, 'activating' it. It sounds complicated, but the idea is really rather plain. Examples are plentiful. To use one of Enoch's own, by raising the price of a pint of milk, your local grocer gives you a reason to consume less milk. It is a case of merely triggering reason-giving because all the grocer does is to alter the non-normative circumstances 'to trigger a dormant reason that was there all along, independently of the grocer's actions. Arguably, you have a general reason (roughly) to save money' (2011, p.4). Thus, in cases of merely triggering reason-giving, the agent has a 'dormant' reason all along; it was merely *triggered* by the act of reason-giving.

The last sense of reason-giving is the most contentious, though most relevant to us. There is a sense that something 'magical', as Enoch puts it, is present if we claim that there are indeed instances of robust reason-giving. (He has chosen to focus on the case of requests, but intends for it to be more than an analysis exclusively about requests: at one point he also uses 'demand'.) Enoch claims that when I request you to do something, I seem to be giving you a reason to act in certain ways in a sense that is more robust than both forms of reason-giving listed above:

Requesting that you read my paper seems importantly different from, say, informing you that your reading my paper will cause me pleasure (a case of reason-giving in the purely epistemic sense) or from making non-collegiality a

ground for denying tenure (a case of reason-giving in the triggering sense). And the same is true... for commands and promises (2011, p.5).

This way of carving up reason-giving into three categories has very strong intuitive appeal. But on the deeper, 'metaphysical' level, Enoch goes on to concede that, in fact, robust reason-giving turns out to be a subspecies—though a unique one—of triggering reason-giving. On the other hand, as Enoch's argument in his later piece called 'Authority and Reason-Giving' suggests, this complication doesn't make robust reason-giving any less special, and that a new reason is *created* by such an act (Enoch 2012, 5). How do we reconcile these? The problem, to put it more precisely, is: how can we reconcile the two facts, that, first, robust reason-giving is a subspecies of triggering reason-giving, and second, robust reason-giving is unique to the extent that we are justified in speaking as if robust reason giving is a *special act* of reason-giving, distinct from mere triggering reason-giving, and out of which a new reason for action arises, despite its being a subspecies of triggering reason-giving?

The attempt to resolve this will be a long journey, for Enoch's dialectic is complicated and requires careful analysis. To begin, I will discuss how Enoch explains the first claim, that robust reason-giving is a subspecies of triggering reason-giving. Enoch begins by contemplating the most obvious way of understanding the act of robust reason-giving, i.e. as the 'activating' of a conditional. He says,

Think about my request that you read my draft. We are assuming that before the request you had no reason to read the draft, and after it you do. But this means that the conditional "If I ask you to read the draft, you will have a reason to read it" was true all along, or anyway shortly before — and independently of — my actually making its antecedent true (by requesting that you read the draft). But

then it is very tempting to think of this case as yet another triggering case of reason-giving; for all I did here is to manipulate the non-normative circumstances so as to trigger your conditional reason to-read-the-draft-if-I-ask-you-to (2011, p.9).

What Enoch highlights here is that it is indeed tempting for one to think that robust reason-giving is nothing but a kind of triggering reason-giving, because if giving you a reason 'robustly' merely amounts to making true the antecedent of some conditional claims resulting in your now having the reason to do certain things, it does seem natural to assume that this act is nothing more than merely triggering a reason which had been what Enoch calls 'dormant', though in existence, all along. Enoch however then goes on to caution that the truth of robust reason-giving being an instance of a conditional claim being activated (i.e. having the conditionals' antecedent satisfied) does *not* straightforwardly entail that robust reason-giving is a subspecies of triggering reason-giving. That is because there are two possible readings of how the conditional functions, and one such reading makes it possible that robust reason-giving, while being an instance of 'activating' a conditional that is true all along, remains *non*-triggering-reason-giving. To understand how this works, we need to look at the two readings of how the conditional functions: namely, the 'wide scope' and the 'narrow scope' conditional readings.

The distinction is borrowed from John Broome and his discussion of instrumental rationality (Broome, 2007). Following Enoch, I will not get into that literature; I don't think familiarity of the discussion between Broome and his critics is essential to the current argument. Broome aside, the distinction between the wide and narrow scope readings can be quickly explained as follows. The narrow and wide scope distinction basically picks out the 'scope' of normative claims—i.e. what falls within the scope of reasons-talk. Here is an example. Consider this claim: 'If your mother asks you nicely to go home for a visit, you most definitely should go.' Let's

assume not implausibly that this is true. Now, the wide scope reading would hold that you have always had a very strong reasons *to go home if your mother asks you*—with what is being italicized there falling within the 'normative scope'. In other words, here, the content of your reason includes the antecedent of a conditional claim (namely, 'if your mother asks you nicely'). Alternatively, the narrow reading would interpret the advice slightly differently. The narrow reading would hold that the content (or 'scope') of the reason does not contain the antecedent; the content of the reason is simply that *you should go to visit your mother*. And, crucially, this is a reason you come to have *only if* the antecedent—which *falls outwith the normative scope* (hence the name 'narrow')—obtains.¹⁷

With the distinction thus explained, it should be obvious how this distinction between the narrow and wide scope reading underlies Enoch's suggestion that by merely showing robust reason-giving to be a case of activating a conditional claim resulting in someone else coming to have a reason in doing certain things doesn't automatically make robust reason-giving a triggering case of reason-giving. That is because, for all we have discussed up till now, robust reason-giving can still in fact be a case of activating a conditional claim *in the narrow sense*, which does not hold that a reason, though dormant, is there all along; the narrow scope reading merely holds that when the act of robust reason-giving takes place, the antecedent is satisfied—and thereby a reason 'arises'. This might be a good way to preserve the thought that robust-reason giving, *as long as we read the conditional normative claim in the narrow sense*, can remain distinct from triggering reason-giving.

¹⁷ We can also formalise our explanation. Supposing 'O' represents 'ought to', 'p' the antecedent of a conditional and 'q' the consequent of a conditional, the narrow scope reading of normative conditional claims can be expressed as follows: $p \rightarrow Oq$; the wide scope reading of normative conditional claims can be expressed as follows: $O(p \rightarrow q)$. This formulation is lifted out from Andrew Reisner's contribution to that literature. See Reisner (2011).

So far so good: we seem to have a way to by-pass the collapsing of robust-reason giving into triggering reason-giving. Unfortunately, it is here that the dialectic gets interestingly complex: after labouring on at length concerning how the distinction between wide and narrow scope is important, Enoch eventually concludes that, actually, the narrow scope reading always collapses back into the wide scope reading. So the earlier suggestion's appeal is merely illusory. Thus, nothing is at stake here after all. His reasoning is that any plausible explanation of the narrow scope reading must rely on the wide scope one, so the previous suggestion fails. I will quote in length to show the point:

For it is a natural thought that while the narrow-scope reading does not entail the wide-scope reading, still the only plausible explanation of the former is in terms of the latter. After all, requests are special in some normatively relevant way. Had I uttered very different words, had I committed some very different speech act (or had I refrained from committing any relevant speech act at all), I would not have given you a reason to read my paper. Furthermore, our personal relationship is, as emphasized above, relevant here. Perhaps, for instance, had a complete stranger asked you to read her draft she would not succeed in thereby giving you a reason so to do. My request is special, then, not just compared to other things I could have done (or failed to do) but also compared to (some) others' requests. *What is it, then, that explains why my request that you read my draft succeeded in giving you a reason, but all these other possible things would not so succeed? The natural reply seems to be in terms of something like the wide-scope conditional: the normatively relevant uniqueness of requests, and indeed of my request, is precisely due to the truth of something like the wide-scope conditional.* The only thing that can explain why my request created reasons here whereas my exclamation "The draft I am working on is really cool!" does not is precisely that you have a prior conditional reason to-read-my-draft-if-I-ask-you, but you don't have a prior conditional reason

to-read-my-draft-if-I-say-it's-really-cool (Enoch, 2011, p.10. Italics mine).

Enoch's point is that insofar as we take the act of robust reason-giving as a case of a conditional being activated, however you read it, the only way to make sense of such a process of activation would mean, ultimately, the person who comes to have a new reason for action after having an act of robust reason-giving done to him *must have* the reason in a conditional form all along. Thus, metaphysically, the robust reason-giving *must* be a subspecies of triggering reason-giving, so argues Enoch.¹⁸

(I will not go into the debate over whether Enoch is right in maintaining that a narrow scope reading must collapse into a wide scope reading. I think it boils down to whether one finds it plausible that an agent's will can itself be the source of reason. If it is indeed plausible that an agent's will can be a source of reason, then perhaps it isn't that strange to think reasons are, as it were, pulled out of from thin air. Just because an agent wills it (under certain appropriate conditions) satisfies the antecedent of the conditional, and a reference to some wide scope reading along the way doesn't seem necessarily. But this debate is unimportant—as will be clear by the end of Section 6. I will show that, in fact, whether the reasons involved in robust reason-giving are 'new' (more at home with the narrow scope reading) or just 'triggered' (more at home with the wide scope reading) is immaterial.)

So now we have a rough idea why Enoch maintains that robust reason-giving is a species of triggering reason-giving. It is time to look at the second claim that is

¹⁸ Enoch goes on to consider some other objections to the claim that robust reason-giving is a subspecies of triggering reason-giving. I will not go into the details here. Suffice for it to say that the main thrust of his replies to those objections all seem to rely quite heavily on intuitions about the trouble of the mysteriousness of having reason drawn out of thin air, and that making robust reason-giving a subspecies of triggering reason seems to be the most natural and non-mysterious solution to the, as it were, 'out-of-thin-air' problem.

seemingly incompatible with the one we just covered, i.e. that despite the first claim, robust reason-giving remains importantly interesting and distinct to warrant our treating them differently from any other triggering reason-giving.

To understand this, we need to pay closer attention to the conditions under which Enoch thinks reasons have been given robustly. There are three conditions to be satisfied for A to have *attempted* to give B a reason to Φ robustly. They are:

- (i) A intends to give B a reason to Φ , and A communicates this intention to B;
- (ii) A intends B to recognize this intention;
- (iii) A intends B's given reason to Φ to depend in an appropriate way on B's recognition of A's communicated intention to give B a reason to Φ (2011, p.15).¹⁹

It is obvious from the quotation that 'intention' is central to the act of robust reason-giving. (i) and (ii) are fairly self-evident, so I am not going to discuss them here. But (iii) requires a bit more spelling out. Enoch explains: 'The third condition can be understood as a generalization of such natural thoughts as that when I ask you to Φ , I intend that your reason for Φ -ing be *that I asked you*; that when I command that you Φ , I intend that your reason for Φ -ing be *that I said so*, etc.' (2011, p.15) We will return to (iii) when I compare Enoch's account of robust reason-giving to what I have been taking a demand to mean in Section 3.

¹⁹ Grice (1957) is similar to this proposal in some ways. There, Grice's aim is to analyse what it is for an utterance to mean something (say, P). According to Grice, for that to happen the utterer needs a complex set of intentions that is quite similar to (i) - (iii) as cited here. Grice thinks the utterer needs to intend, first, that his audience believes that P, and, second, to intend that the audience believes that P *because* the audience recognises the utterer's intention that she believes that P.

Note that Enoch wants these conditions to be the conditions for A having *attempted* to robustly give B a reason to Φ . This is an extremely important point—one that I think Enoch hasn't sufficiently highlighted. It is also particularly important to my purpose when I apply Enoch's analysis to understand rights-backed, authorized demands—it will become apparent below.

On top of these conditions for A having attempted robust reason-giving, there are further conditions for the attempted act of reason-giving to be *successful*. They are, first:

(1) For A's attempt to robustly give B a reason to Φ to succeed, B must recognize A's above specified intentions, and furthermore B must allow these intentions to play an appropriate role in his practical reasoning (2011, p.16);

and second:

(2) the attempt must make it the case that a reason to Φ really does emerge (in the appropriate way) (2011, p.16).²⁰

(1) is what Enoch calls the non-normative success condition. Note that (1), unlike (i) to (iii), is about B—B must, first, recognise A's intentions, and, second, B must allow these intentions to play an appropriate role. This means that on top of A's intention (governed by (i) to (iii)), it is necessary for B to react in certain ways for A's attempt

²⁰ It seems possible to press Enoch on further conditions: e.g. for an act to be successful at robust-reason giving, there must be some form of minimal effective communication between A and B, to the effect that 'B at least catches what A is saying'. That sounds right to me, although I am not going to focus on this criticism because it seems to be something we must assume for other types of reason-giving, too, robustly or not. Even for me to give you reason epistemically, the same condition must also be in place. It is thus less philosophically interesting in our current discussion of specifically what is peculiar about robust reason-giving. I thank Alexander Stathoupolos for pressing me on this point.

of reason-giving to 'succeed'.

(2) is also presented as a necessary condition. Enoch calls (2) the 'normative (success) condition'. Recall that (2) specifies that 'the attempt must make it the case that a reason to Φ really does emerge (in the appropriate way).' What does the 'appropriate way' clause mean? Enoch elaborates as follows: '...we already know that whether this procedure will result in there being a reason to Φ here will depend on there being an independent reason that is triggered by this procedure—roughly a reason (for B) to do as A intends that B have a reason to do' (2011, p.16). Thus, this is where the earlier discussion about robust reason-giving being a subspecies of triggering reason-giving feeds in. In plainer language, (2) is simply about whether there is something for the purported act of reason-giving to be triggered; it is necessary that there is for the act to amount to successful robust reason-giving. Notice too that (2), like (1) and unlike (i) to (iii), is not a requirement about A, but something *in the world*, as it were; but unlike (1), (2) is about some *normative* facts about the world, whereas (1) is about B.

So far so good, but if we try to understand what these conditions are *really* showing, this is where Enoch's own analysis becomes vague. There are actually *two* ways to read what these 'success conditions' are meant to denote. In fact, it is obvious that both readings are present in Enoch's mind, for he says of (1) in pinning down which reading he favours '... this condition [i.e. (1)] is not necessary for the attempt to succeed in amounting to a robust reason-giving, but rather for it to succeed in having the intended kind of effect in the world... This condition (condition (1)) is not sufficient for the attempt at reason-giving to succeed, *not even for it to succeed in amounting to a robust reason-giving*' (2011, p.16).

This suggests it was obvious to Enoch that there are at least two ways to read what these success conditions are. The first, weaker, way is for acts to be successful *in the*

sense that they amount to robust reason-giving. The other is for these acts of robust reason-giving to be successful *in the sense of, in his words, 'having the intended effect in the world'*. I think it is reasonable to assume, following his drawing of the distinction between these two readings, that there *could be* successful robust reason-giving that fails to have the intended effect in the world—this is what I think Enoch fails to pay enough attention to.

While Enoch is being explicit about what he thinks (1) is concerned with (i.e. which reading of 'success' he has in mind), he is less clear about (2). That is, he is not explicit about whether (2) is a success condition *in the sense that they have the intended effect in the world*, or merely *in the sense that they amount to robust reason-giving*. Here, as elsewhere, when the author is being vague, I think we as interpreters are allowed a bit of discretion. I think it is more natural to read (2) as a success condition in the sense that it is a condition about whether an attempted act of robust reason-giving amounts to robust reason-giving. I think this assertion about (2) is supported by the very nature of (2). (2) simply doesn't look like it is a condition about the intended effect in the world the way that (1) is. Recall, in the simplest terms, (2) is about whether there is anything (in the form of a 'dormant reason') already there for the robust reason-giving to be triggered by. But if this is what (2) means, then surely, having satisfied (i) to (iii) and (2) ought to be, in fact, *sufficient* for an act being a successful attempt in robust reason-giving—which may or may not have the intended effect in the world, i.e. depending on whether (1) is further fulfilled.²¹ (1) is simply not a necessary condition for an act being a successful act of robust reason-giving *in the sense that this act amounts to a case of*

²¹ I am not sure whether Enoch is happy with the argument in this and the previous paragraph—as I said, he seems rather vague about the two readings (which he introduced himself) of what those success conditions mean. Regardless, I am prepared to defend my reading: I think it makes more sense than to treat the two success conditions as if they are about the same sort of thing—they seem to me to be not.

robust reason-giving.

Let's illustrate this last point with a 'test case'. Imagine here a case where A is asking something from B. A, when asking, has all the 'right' sorts of intentions as specified in (i) to (iii). Furthermore, B turns out to be in just the kind of normative relationship with A such that there is an independent reason (e.g. a reason to do something if A requests so) for B to, other things being equal, do as A tells B, which A's very asking does in fact trigger. So (2) is also satisfied. But, crucially, B refuses or fails to acknowledge A's intentions, and (it trivially follows that) B does not allow A's intention to play any role in his practical reasoning—hence (1) does not obtain. This is the sort of case where I think the importance of reading (1) and (2) as being success conditions in different ways really shines. Reading (2) as a success condition in the way that I did allows us to say, in this case, that A has succeeded in giving B a reason robustly *in one sense but not another*: A has succeeded in giving B a reason robustly (so successful in one sense)—it is just, because of some *non*-normative facts about the world (namely B's actual, contingent reaction), A's robust reason-giving does not have the intended effect in the world (so not successful in another sense). Of course, both (1) and (2) are necessary for the attempted robust reason-giving to have the intended effect in the world, and I am not contesting this claim. What I am claiming, however, is that there is a special status for attempted acts of robust reason-giving that satisfy (i) to (iii) and (2), but not (1): agents performing acts like that seem to have indeed succeeded in doing something normatively—but it is just B who stands in the way of this successful act from having any impact in the world. Plainly put, the reason in cases like this has indeed been given—and robustly too—but A can't really help it if B is refusing to 'play his part'. We shouldn't, I think, allow B's reaction to the given reason come into our evaluation of whether A has, actually, given B a reason robustly. It will be like saying I haven't thrown you a ball just because you refuse to catch it.^{22 23} (This distinction

²² In other words, it seems what I am arguing for here is the the 'robustness' of robust reason-giving comes

with (2). It is, and Enoch is probably happy with this claim, the independent-but-triggerable reason that is doing all the normative work in robust reason-giving; and this is clearly captured by (2) and has nothing to do with (1).

- ²³ There is a further complication here that I am going to set aside regarding how (1) should be read. Note that (1) contains two smaller conditions; we can call them (1a) and (1b). (1a) states that B must recognise the complex intentions spelt out in (i) to (iii). (1b) states that B must allow the complex intentions, spelt out in (i) to (iii), to play the appropriate role in B's own practical reasoning. So the complication here is that my arguments to the effect that (1) should be read as a success condition in the 'successful as having the intended effect in the world' sense is correct *only if* we focus on (1b); (1a), it can be argued, seems to be a success condition in the 'successful as amounting to robust reason-giving' sense.

One might argue, in cases where (1a) does not obtain, we intuitively hold the judgment that the act in question is not even a successful instance of robust reason-giving in virtue of (1a) not obtaining. An example of this kind: Imagine if, when I ask you to do something, you actually don't recognise my intention outlined in (i) to (iii). For example, I do intend for you to, along the line of (iii), take my demand as the reason for doing what I asked you to do. I have also done what I can on my part to communicate that to you. But, for whatever reason, you don't recognise that. Here, do we want to say I have given you a reason to do something robustly? I think the answer to this is rather complicated. My sense is the answer to the challenge depends on why the 'you' in the above example does not recognise my intentions. Generally speaking, if the person being addressed is simply 'incapable' of recognising the complex intentions outlined in (i) to (iii), then it indeed sounds strange to say that one has successfully given that person a reason robustly. Here, it sounds as if the objection has some bite: we might want to say that condition (1a), that 'the addressee has to recognize the complex intention', not obtaining makes it the case that the act is not an instance of robust reason-giving. Therefore, (1a) has to be a success condition in the sense that it is about the success of the act amounting to robust reason-giving.

However, let us come up with a different story regarding the reason behind the addressee's not recognising those intentions. In this modified story, the person being addressed is perfectly capable of recognising the complex intentions as outlined in (i) to (iii) but *chooses* not to. This seems to be a very different reason why (1a) does not obtain. Here, my intuition is rather different. Given the addressee chooses to ignore those intentions, despite (1a) not obtaining, the act *is* successful even as amounting to robust-reason giving. In this case, (1a) is a lot more like (1b), in that they are now both completely about B's will; that is, whether an act, performed by A, counts as robust reason-giving becomes

between different ways of reading the success condition will turn out to be important later when I start considering how a demand theory of rights can benefit from Enoch's philosophical framework, in Section 3.)

Now the rather detailed analysis of the conditions for robust reason-giving is complete, we should ask: what use is all this? Recall why we are engaging with this complex set of conditions to begin with. It is because these conditions mark out the logical space for a *special* class of triggering reason-giving (within triggering reason-giving and vis-à-vis *merely* triggering reason-giving). And the marking out of this space is important because this is the line Enoch takes to explain how robust reason-giving is special despite being a subspecies of triggering reason-giving: that, Enoch seems to think, warrants the use of the description of 'new reasons' in cases of robust reason-giving despite their actually being instances of 'triggering reason-giving'.

This is all very well, some might think, but still there is a sense that robust

something at the mercy of B's will. If we return to the analogy of ball-throwing, the force is strong here: the one throwing the ball really cannot 'control', in some sense, how the supposed catcher reacts; and presumably, we don't want our judgment of whether the thrower of the ball has successfully thrown a ball to be held hostage to whether the catcher feels like catching the ball.

Having said all that, I do not want to dwell on this point for too long. There is further work to be done in spelling out when, exactly, (1a) sounds like a success condition in the sense of succeeding as an instance of robust reason-giving, and when (1a) sounds more like a success condition in the sense of succeeding in having the intended effect in the world. I suspect it has to do with whether the person being addressed is 'capable' of recognising those intentions, but I admit I do not have an established account here on offer. But this should be more than enough to get us going, because the sort of cases I am interested in will be more like the second kind of scenario; I am not interested in cases where someone attempts to give reason robustly to inanimate objects or agents who are inherently incapable of recognising the said intentions.

reason-givings thus understood are still cases of triggering reason-givings—and there is no amount of window dressing about how special robust reason-giving as a subspecies of triggering reason-giving that will make robust reason-giving give rise to *new reasons* for action *per se*, whatever Enoch's own language elsewhere later on seems to suggest. To fully evaluate whether this constitutes a problem for what I am going to say, I will have to leave it aside until I have actually presented my account. I however want to make a preliminary point here about what it means to accept that robust reason-giving doesn't *really* give rise to new reasons for actions. I take it what Enoch has been hesitant towards all along here is what is sometimes known in the literature as 'source voluntarism', i.e. the thesis that holds a will can *be*, or exhausts, (depending on how strongly one holds the thesis to be) the source of normativity.²⁴ Given how controversial the view is, if source voluntarism has to be true for the claim that a new reason is *created* by acts of robust reason-giving, this itself gives us a good reason to doubt whether we need something as strong. That being said, I want to leave it open at this stage whether a *new* reason is actually being created by robust reason-giving; I will argue later that nothing much hinges on this. Suffice for us to say at this point two things: first, it is not clear whether everyone would agree with Enoch that the mysteriousness of reasons being drawn out of thin air is really fatal to such a view. Darwall, for example, has advanced claims elsewhere that seems to suggest he thinks, given certain conditions, to make a claim against someone else *is* to give a new reason for others to act in certain ways (2011). Second, even if robust reason-giving does not really *create* new reasons out of thin air, as Enoch has explained, the way a reason is 'triggered' by a peculiar kind of process surely marks it out to be special. And we can't at this stage evaluate whether, for my purpose, it is sufficiently distinct despite not creating new reasons from scratch *until* we have discussed what my account of rights is. Thus, for now, I

²⁴ For a contemporary discussion of this, see Chang, (2013). Also, as cited in the Introduction, Darwall (2011) can be considered as an example of this view.

will take Enoch's rhetoric of new reasons at face value. I will return to this before the end of this chapter (in Section 6).

3 Authorized, rights-backed demands as instances of robust reason-giving

It is important to remind ourselves why Enoch's framework is important for my purpose here. Enoch's analysis is helpful because it gives me a philosophical framework with which to articulate what I mean when I maintain that rights-backed, authorized demands matter in a way that goes beyond simply being an epistemic highlighter. To use Enoch's conceptual framework, to say that the farmer's demand matters normatively is to say that the farmer, when making that demand as he does, is giving reason *in the robust sense*.

Of course, I will be stressing the compatibility between what I want to say and Enoch's framework, but to sweep away any doubt before we begin, I shall now highlight a perceived mismatch between my terminology and Enoch's. It might seem to some here that I am tagging onto something that I shouldn't, given what I take to be 'demands' and 'robust reason-giving' are actually very different things. To tease out how different they are, simply consider the case of threats. A robber, holding a knife against your neck, is clearly threatening you; the threat is: 'give me your money, or I will kill you' (or something along this line). When the robber says or indicates, 'give me your money', that seems to be clearly a demand—at any rate, it seems to have met the two defining features of a demand we discussed: the robber wants something done, and the robber makes it explicit that he wants that thing done. All this is very intuitive. But this threat does not qualify as robust reason-giving according to Enoch's conditions—and Enoch takes it to be a strength of his account that it doesn't. Specifically, Enoch doesn't think a threat passes (ii) and (iii). He says,

...this account [of robust reason-giving] seems to me to get the central cases

right, and for what seem to be the right reasons. Threats, for instance, are not cases of robust reason-giving (and so are cases of merely triggering reason-giving), because, though the intention (i) is present in threats, (ii) and (iii) typically aren't. Of course, the intentions (ii) and (iii) may be present in some threats, perhaps when the one issuing the threat also attempts to give a reason robustly. But these further intentions are in no way necessary, or even typical, for threats (2011, p.18).

I agree with this analysis. Threats aren't, and shouldn't be, instances of robust reason-giving. Yet this is no trouble for my tagging onto Enoch's conceptual framework. That is because I do not intend for my notion of *demand* to map onto robust reason-giving anyway, despite the initial, perceived appearance. My use of demand, if anything, is more similar to (i) and (ii), so a 'weaker version' of an *attempted* robust-reason giving (i.e. Enoch's robust reason-giving minus (iii)). I am not going to dwell on this much longer, as how demands fit into Enoch's framework doesn't seem relevant.

All I want to claim, and all I need to, for the purpose of my argument is that a rights-backed, authorized demand is an instance of successful robust reason-giving. Immediately below, let me show how rights-backed, authorized demands are standardly a kind of robust reason-giving.

I think how a right-based, authorized demand satisfies (i) and (ii) is quite straightforward, so I won't say much about that. (I take it it isn't that contentious to suggest, for example, that the farmer in our story intends to give the campers a reason to leave, and that he communicates that intention to them, and that he intends for them to recognize that intention.) But (iii), on the other hand, is more delicate. Condition (iii) is, recall, 'A intends B's given reason to Φ to depend in an appropriate way on B's recognition of A's communicated intention to give B a reason

to Φ ' (2011, p.15). The question we have to answer is then: When a right holder makes a rights-backed, authorized demand, does the right holder intend for the very demand itself to *be* the reason for the addressees to do or refrain from doing certain things? Or, to put it in more concrete terms via the story of the farmer, when the farmer demands the campers to leave, does the farmer intend for the campers to leave *because he demands them to*?

It seems to me the answer has to be 'yes' here. I simply cannot make sense of how a right holder, when making a demand about the content of his right against someone, actually does not intend for his demand to matter and play a role in the practical reasoning of others. Or, recall Feinberg's insight: for the right holder to be standing on the moral furniture of rights in making a claim or demand, it is quite natural to assume that the right holder is intending for the claim to be taken seriously, to *be* the reason of action of the addressee.

So it seems as far as (i) to (iii) are concerned, we are on pretty safe ground; I think we can fairly confidently say that a rights-backed, authorized demand is at least an attempt to give reason robustly. Let's move on to (1) and (2), the two success conditions we already discussed.

Let's start with (2). A rights-based, authorized demand would satisfy (2) because rights seems to be *exactly* the sort of things that can underlie (2). Recall what (2) is: 'the attempt must make it the case that a reason to Φ really does emerge (in the appropriate way).' And as we have discussed, this means that for the attempted robust reason-giving to be successful, there has to be something normative (i.e. a conditional reason) there, already, for the act of robust reason-giving to actually trigger. And of course, in our case, there *is* a story to be told about what those independent triggerable reasons are: rights. The very notation of 'rights-backed' *might just be* a description of this relationship between the rights and the triggering

of the dormant reason.

Think about the farmer again. His rights-backed, authorized demand satisfies (i) to (iii), that much we have already shown with minimal effort. Now for that demand to satisfy (2), we need there to be a kind of independent, dormant reason that the very act of the demanding can trigger. What will that reason look like? It has to take a form similar to this: when the farmer demands something about his property, there is a reason to do as told (under some circumstances).²⁵ Can that be plausible? I think so: the fact that the farmer has a right to his property seems to me a rather good justification for this independent reason being true. So a rights-backed, authorized demand satisfies (2) as well.²⁶

Whether rights-backed, authorized demands fit (1) is more complex. As I explained, I do not think (1) is a success condition of robust reason-giving in the sense that when (1) does not obtain, the act in question is no longer an act of robust

²⁵ And, recall, if Enoch is correct, it doesn't matter whether we take the narrow or wide reading of the normative scope: it is all about the wide scope eventually anyway.

²⁶ I do not pretend to have a full story explaining the relationship between rights and these dormant reasons. But there is something this relationship definitely *isn't*: the rights and these dormant reasons just can't be 'the same thing', i.e. the rights cannot *just be* these dormant reasons. Because if they are, there is no space left for rights *themselves* to matter. I am jumping the gun here as the discussion will come later in Section 5 of this chapter, but a demand theory of rights of the kind I am proposing cannot be a *full theory* of rights—hence why I said earlier I do not like the label of 'demand theory'. That is to say that a complete account of rights must try to capture the importance of rights by *more than* just looking at demands themselves. As will be clear, the fact that A has a right to Φ must be of importance by itself, regardless of whether there are demands or claims made backed by the rights to Φ . If this is something a theory of rights should retain, then rights *themselves* must matter in a way that is beyond being mere dormant reasons. We need to have a story about the relationship between rights and these dormant reasons such that rights can still matter normatively without these dormant reasons being triggered. I don't see how that is possible if we hold that they are 'the same thing'.

reason-giving; and I think Enoch should agree with me on this. Rather, failing (1), it merely means the act, *even when the act is a successful attempt at robust reason-giving*, does not have the 'intended effect in the world', i.e. the addressees of the demand just didn't respond properly. Thus, strictly speaking, whether (1) obtains is beside the point when we are interested in the question of whether a right-based, authorized demand is an instance of robust-reason giving; **in cases where addressees fail to respond as they should, a rights-backed, authorized demand is still an instance of robust reason-giving as long as (i) to (iii) and (2) are satisfied.** In cases where (i) to (iii) and (2) are satisfied but not (1), it is just a normal case of someone legitimately exercising her right but others fail or refuse to abide.

Now that the connection between my idea of a rights-based, authorized demand and that of Enoch's idea of robust reason-giving is explained, one point I want to highlight about my account should be pretty obvious: the demander of this rights-based, authorized demand is most certainly *not* merely giving reason in the 'epistemic sense'. When, say, the farmer tells the people on his property to get off, he is not merely reminding them that they have reasons not to be there, irrespective of his demand. He is, rather, *demanding them to get off his property as a right holder*. There is no way we can respect this capacity of the farmer as the right holder if we simply treat his demand as epistemically-highlighting. And Enoch's framework allows us to tell just the story explaining how that happens. (Feinberg himself also strongly agrees with this point. See his (1970) when he talks about the distinction between 'claiming that' and 'making a claim'. The former, which Feinberg is clear about that is not what he is after, is meant to pick out something epistemic—which is *not* the focus of his argument.)

This is a point where bringing in Stephen Darwall's view on rights and practical reasoning is helpful in further fleshing out my view. The differences between my

view and Darwall's aside, this is the place where we are in agreement. (Darwall's theory will be explained, and contrasted with mine, in next chapter in far grater details; see Section 2-4, Chapter 3.) The fundamentals we agree on are: both Darwall and I think that in the case when a right holder is making a rights-backed, authorized demand on someone else, something like what Enoch calls robust reason-giving is happening.

Crudely put, Darwall's thought is that a right holder has a second-personal authority to make a special kind of demand regarding her right. (2006, p.18) The whole idea of second-personal authority is rather complex, but at the risk of oversimplification we can say that for X to have second-personal authority over Y, X's 'duly authorized claim creates a distinctive reason for compliance (a second-personal reason)' (2006, p.11).²⁷ Thus, I think if we were to see Darwall as advancing an account of rights, it can be formulated as follows: if X has a right, then X has an authority to make a kind of demand on others regarding the right—and that rights-backed, authorized demand creates a reason for others to act. Crucially, Darwall and I both think that this reason is one that is a *distinct* reason which is in some sense *dependent upon* the making of the demand.

Given the similarity between our views, looking at the contemporary debate on the criticism Darwall receives on this point is helpful. In the coming section, I am going to summarize the criticism that Darwall receives by, like me, maintaining that a rights-backed, authorized demand gives rise to distinctive reasons for action. I will defend Darwall's view on this, and by doing so give a preliminary defence of my view.

²⁷ I will return to a much more detailed discussion of Darwall's view in Chapter3

4 Stephen Darwall's 'second-personal standpoint', rights, & 'being prone to' make a demand

Both my view and Darwall's entail something that discomforts some, since the view implies something, they claim, very strange about the outlook of practical reasoning. R. Jay Wallace (2007) argues that Darwall's account cannot be correct, because accepting it would mean that the second-personal reason we have regarding the right holder isn't present until the demand has been made. He argues:

[Darwall's account] has puzzling consequences, if we take seriously the idea that *it is the addressing of a claim or demand that is the source* of distinctively second-personal reasons. The claim or demand that is at issue in this case is the victim's protest, which we should understand as creating a reason for you to desist, in virtue of the victim's authority to make demands of precisely this nature. This suggest that you did not have a second-personal reason to refrain from stepping on the victim's toe until the protest was issued. This cannot be right, however. Surely we want to say that you have an agent-relative reason not to step on someone's gouty toe that is (to some degree) prior to and independent of any complaint that might be issued after the toe has actually been stepped on (2007, p.26. Emphasis mine).

Wallace's concern here is that in Darwall's account, by stressing that the second-personal reason comes into being when, and in virtue of, the demand being made, there is no room left for others to have reasons to do, or refrain from doing, certain things about the right holder in the event of no authorized demands having been made; that is, before I say, 'get off', you have no second-personal reason to *not* step on my gouty toe (which, incidentally, is an example originally discussed by David Hume). This, Wallace thinks, surely can't be right. Note how my view, since it shares with Darwall's the thought that a rights-backed, authorized demand gives rise to a reason that would otherwise not have been there if not for the making of

the demand, faces the same challenge from Wallace. The farmer from our original story has a standing which seems very similar to the toe-owner before the actual act of demand has taken place. Thus looking at the debate between Darwall and Wallace should be instructive in understanding to what extent my view is under threat.

Wallace considers a possible answer, offered by Darwall himself, to this challenge, though Wallace ultimately dismisses it. The answer Wallace considers is that, according to Darwall, while the second-personal reason is created by the act of demanding, when a demand is thought to be 'in force' actually should be very liberally interpreted—almost to the point of ridiculousness, as I shall argue later. Darwall's view is that it isn't, as it turns out, the actual demanding by actual people that matters; rather, it is *the fact that right holders are prone to make those demands* which makes a demand 'in force'. What he means is that the mere fact that a right holder, for whatever reason, does not (or fails to) make a demand does not lead to there being no demand 'in force'. It is the fact that the right holder is 'prone to' make a demand that generates reasons. (2006, p.290; 2007, pp.64-5).²⁸ This can be taken as an answer to Wallace's worry because Darwall can now claim that the second-personal reason *has always been there*: the 'demand' we should be focusing on isn't the actual act of demanding, but whether one is prone to demand. And obviously, one can be prone to demand without actually making a demand. So, the agent-relative reason is there all along, insofar as there exists a right holder who is prone to make a demand backed and authorized by the right.

²⁸ Darwall himself has never been quite clear about what constitute someone being prone to make a demand. Enoch seems to take that to mean the possibility of making a demand (Enoch, 2011, p.5). Wallace seems to interpret it as having the disposition to demand (Wallace, 2007, p.26). I myself find it extremely puzzling—which, I think, in turn strengthens my argument later in this section about the failure on my part to see the force of one being prone to make a demand, as opposed to actually, contra Darwall, making the demand.

Wallace dismisses this answer because he thinks basing the reason-creating power on proneness to demand is absurd. He says of the above reply:

It continues to make moral obligation hostage to the actual responses of the individuals implicated in interactions with each other, in ways that are problematic. Your reason not to step on the gouty toe of your neighbor seems to obtain independently of whether the victim of the condition orders you not to tread on it, but it seems equally independent of whether the victim, or anyone else, is in fact disposed to respond to your treading on his toes with resentment, indignation, and similar accountability reactions (2007, p.27. Emphasis mine).

Note here that Wallace is assuming, presumably alongside Darwall, that one is prone to demand something even if all one does is to have certain reactive attitudes. For example, Wallace writes of the way Darwall expands when a demand is 'made':

On the expanded account, demands are addressed not merely when they are explicitly articulated (in the form, say, of a command or a protest) but also when there is present a disposition to respond to violations of implicit norms or standards with the reactions characteristically associated with accountability and blame' (2007, p.27.)

(Understandably, the idea that a demand should be considered to be 'in force' when it is prone to be made is a strange one on the surface. But it makes a lot more sense once we have a better understanding of what Darwall wants to achieve by and large in his grander philosophical project, and why he needs to adopt such a peculiar conception of demand. I shall return to this in Section 3, Chapter 3. In the meantime, I ask my readers to suspend their scepticism towards my reading of Darwall's view until then.)

I agree with Wallace here that Darwall's reply fails, bordering on the absurd. In fact,

I would go further than Wallace does: one might in fact argue that it is not at all clear why proneness to demand, as opposed to actual demanding, would give rise to any reason at all. What is attractive, I think, behind Darwall's original contention about rights is its elicitation of the insight suggested by Feinberg about rights being useful pieces of moral furniture—whose work Darwall explicitly cites; it captures something significant: that right holders, Darwall's view maintains, are in a position to make a special kind of demand that would, normatively speaking, make an impact, a difference. But Darwall's reply loses sight of this insight by liberally reinterpreting the concept of a demand, intending for it to be 'in force' without actually being made. I fail to see why Darwall thinks this extension is justified. Just as my being prone to insult or praise you is different from my having insulted or praised you, someone being prone to make a demand is equally different from one having made a demand. My being prone to slap you on the cheek is most certainly normatively different from my having actually slapped you on the cheek. The whole move of transposing the normative implication of making a demand to cases of being *prone* to make a demand is on very shaky ground: the intuitive force of the original argument which is about demands, not *prone*ness to demanding, just drops out of the picture completely. (This highlights one major departure I have from Darwall's so-called demand theory of rights. I will say quite a bit more about this in the next chapter which is devoted to contrasting my account and other similar accounts. See Section 2.2, Chapter 3.)

All that aside, I do agree that Wallace raises something that ought to be taken seriously; we should indeed consider whether my view and Darwall's view about the normative implication of rights-backed demands give rise to a strange outlook in practical reasoning terms. Thus, I suggest a different line of responding to Wallace, a response that does not invoke the the right holder being prone to demand. My answer will be that we should examine the reasons behind Wallace's worry and question whether they are actually troubling to begin with.

5 Rescuing actual demands and a move to a 'partial theory' of rights

Having rejected Darwall's own answer, in this section I want to offer a fresh answer to Wallace's question on behalf of Darwall, and by extension a defence of my own view. I will defend the core proposal about the reason-creating feature of a rights-backed, authorized demand made by the right holder while resisting Darwall's problematic, liberal interpretation of when a demand is said to be in force. Given I have rejected Darwall's own answer to Wallace in the previous section, my defence of his view obviously will result in a Darwall-ian account that involves some substantive modifications to his original thoughts. However, I think it is nonetheless one that is more faithful to Feinberg's original insight, to which Darwall makes explicit appeal.

In particular, I want to challenge Wallace's reasoning in launching the worry in the first place; I want to argue that the fact that a distinctive reason is being created when a demand is made (as Darwall would agree) *doesn't* imply that being a right holder alone (in cases where no demands are made) gives no normative reason; Wallace's treatment on this point is hasty.

Recall that Wallace's reasoning appears to be, in essence, that if following Darwall we accept that the (second-personal, rights-related) reason that the right holder gives others is *created* when, and in virtue of, the demand being made, *then* we are compelled to accept that in cases where a claim or demand is not made, there is no (second-personal, rights-related) reason to be found.

I find this inference misguided. There is nothing that precludes us from being committed to Darwall's view while simultaneously rejecting Wallace's inference. Now, what drives Wallace to his reasoning, I suspect, is an underlying assumption about the nature of Darwall's account of rights: that it is a *complete* account of rights, in the sense that all the normative significance of rights is to be explained via the

second-personal reasons which come from the authorized demand that is actually, or is prone to be, made. Darwall himself thinks in this way, hence his attempt to inflate the scope of when a demand is in force to the point of obscurity, but I think we should not follow Darwall on this specific point.

I think a better account of rights that grows out of Darwall's writing is a view about rights that I here advocate: one that is *partial*, in the sense that one does not try to explain all the normative significance of rights in terms of the reason-creating feature of the right holder's making of the demand. Once read in this light, a Darwall-ian account of rights—as a *partial account* merely focusing on the reason-creation feature of the right holder in virtue of making a rights-backed, authorized demand regarding her right—doesn't say anything definitive about the normative situation of the right holder (e.g. what reasons there are for others to act in certain ways regarding the right holder) *when no demand has been made*. Thus, subscribing to a partial account of rights will allow us to get around Wallace's challenge in a different way. It is *false* that by holding the view of rights which Darwall and I do, there isn't any logical space for there being reasons for others to act or refrain from acting in certain ways *prior to* and *independent from* those demands being made; the account doesn't rule those possibilities out—it is just silent about them.

To reiterate my point, let us quickly recall the story of the farmer again. Wallace's charge on my diagnosis of what is going on there is that if Darwall and I were to claim that the farmer, in virtue of making a demand about the content of his right (i.e. 'get off my property'), is creating a new and distinctive reason for the campers to leave, the result is absurd: it would mean that there is no reason for the campers *not* to camp there prior to the farmer's making of that demand. Darwall's own reply, which Wallace dismisses, is that even in cases where the farmer is not *actively* making the demand, the demand is still in force, insofar as the farmer is *prone to*

make the demand. My reaction to Darwall's reply is similar to but goes beyond Wallace's here. Wallace thinks that whether the demand is in force remains dependent on something contingent, almost accidental, about the farmer. And that can't be right. I think this reaction to Darwall's reply here should be more vigorous, in that it just fails to show why being prone to make a demand to the campers matters at all—since we have been talking about demands, not proness to demand, all along. My subsequent attempt to save Darwall's original position is to claim that this position actually need not result in what Wallace thinks it would. I see no reason to think, just because in virtue of making that demand the farmer gives rise to a new and distinctive reason for the campers to leave, it follows that there is no reason in cases where the farmer doesn't, hasn't, or is incapable of making the demand. Nothing prevents us from thinking that the campers have *multiple* reasons when confronted by the farmer. Thus my response to Wallace is different from Darwall's. The best strategy I think is to insist that Wallace's criticism is a pseudo-challenge at the outset about the 'absence' of reasons for the campers to not use the farmer's land prior to the demand being made by the farmer.

6 The double-reason problem

But there might be another worry that grows out of this account; I call this the *double-reason problem*. The resulting picture might remain troubling to some because one might think that if both i) the right and ii) the demand the right authorizes give rise to reasons on others, does it not mean that when rights are violated, a right holder who has made a rights-backed, authorized demand about her right will be somehow *wronged more severely* compared to if she hadn't made the demand, and that the right-violator would have done something that is *more wrongful* to the former sort of right holder, *ceteris paribus*?²⁹

²⁹ To make sense of this worry is, perhaps, to ignore the alleged counter-intuitiveness of talking about

I think this worry is misguided; it arises because of the wrongly-presumed relationship between reasons and wrongness.³⁰ For this worry to get off the ground at all, one must assume the truth of a principle that roughly takes the following shape; I suggest two formulations:

A: For a person, P, P's φ -ing is somehow *more wrongful* than P's ψ -ing if there are more reasons for P not to φ than there are reasons for P not to ψ , *ceteris paribus*.

B: For a person, P, P's φ -ing is somehow *wronging another person, V, more* than P's ψ -ing if there are more reasons regarding V for P not to φ than there

wrongness as if it comes in degrees, on a spectrum, and is comparable with one another in any meaningful way. (If one can't make sense of the worry to begin with, it is not a problem for me: one can then perhaps skip to the next section.) I have no intention to defend the counter-intuitiveness; I will be content to have noted that there indeed seem to be supporters of this kind of view, both in its usage and theorising. And given this line is not universally seen as ridiculous, this is enough motivation for my defence in this section.

In terms of usage, examples are plentiful; for instance, in discussing John Gardner's view on the famous so-called 'pure case' of rape, Douglas Husak writes: '... different kinds of rape are wrong for different reasons. In the case Gardner recounts, in which we can suppose that the perpetrator is careful to ensure that his victim remains unaware, I am inclined to believe that the rape is less wrongful than in more typical cases. By the same token, a rape would be more wrongful if the defendant took steps to ensure that great harm would ensue' (2009, pp.184-5). On the theorising front, Martin Peterson and Nicola Espinoza, for example, seem to favour something quite similar to this view in an unpublished paper (Peterson and Espinoza, *Unpublished*). I will therefore take the motivation behind this criticism for granted.

³⁰ Here I also bypass the debate over whether wrongness is a *reason* for not doing something, or just the *status* of the action you have most reasons not to do (thus endorsing the 'buck-passing view' of wrongness in terms of moral motivations). For an example of the debate in that sense, see Scanlon (2007).

are reasons regarding V for P not to ψ , *ceteris paribus*.³¹

Now, *if* this principle, in both of its formulations, is indeed true, then I admit that my proposed new account of rights is troubling. The principle will lead to the following absurd conclusion: a right holder who doesn't, hasn't, or fails to make a rights-backed, authorized demand regarding her right is somehow *wronged less* when her right is violated compared to the right holder who makes an authorized demand (according to B); and the right-violator is doing something *less wrongful* facing a right holder who doesn't, or fails to, make a demand compared to the one who does (according to A). This is, obviously, absurd.

However, I don't think we should accept the principle in either form: and hence we are not forced to accept the conclusion it entails. Let's take A first. I fail to see why the fact that there is more reason(s) (NB: 'more' in the sense explained in the fn. 31) for P not to ψ than not to ϕ entails that P's ψ -ing is 'more wrongful' than P's ϕ -ing. I shall offer some support.

To begin with, if the above principle appears too abstract to make sense of, try thinking about the reasoning behind it in more concrete terms. Let's say Wealthy, Poory and Needy are all friends. Poory and Needy are in equally dire need of

³¹ An important remark on the principle before we go on: the 'more... to' locution in the principle isn't meant to be taken as meaning 'counting reasons' in the most straight-forward, mechanical way (as in 'there are 3 reasons regarding V for P not ϕ -ing and 4 regarding V for P not ψ -ing, hence it will be more wrongful for P to ψ than to ϕ '). It is meant to capture the more delicate sense of 'marginally more... to', as in there is an extra reason on others in acting in a certain way when a right holder makes her demand as compared to a right holder who doesn't: for according to the account I favour, the right holder creates a new reason in virtue of making the demand. This reason is something *on top of* the set of reasons present in virtue of the right holder's status of simply being a right holder.

financial assistance; Wealthy is the richest man on this planet, and the sum of money to help Poory and Needy is insignificant to Wealthy's wealth, and so on. (Details are not important: the point is just to build up the story such that it is reasonable to think that Wealthy has good reasons to help both Poory and Needy.) Wealthy, let's further stipulate, thus has a reason, relative to Poory and Needy, to help both Poory and Needy in virtue of the fact that they are Wealthy's friends. Now—and here comes the crux—imagine too that Wealthy has promised to help Poory but has not made a similar promise to Needy, thereby giving Wealthy an *extra, additional* reason in helping Poory compared to helping Needy. Do we want to follow the principle (formulation A) and claim that Wealthy will be somehow doing more wrong in not helping Poory than not helping Needy should he decide to help neither, in virtue of the difference in the set of reasons in helping them? I think the answer should be a resounding 'no', contra what the principle says. This, I think, is sufficient to demonstrate that the principle discussed above cannot ground the worry my hypothetical interlocutor is trying to raise.

Similar things can be said about formulation B of the principle. To use the story involving Wealthy, Poory and Needy in the paragraph above again, if formulation B of the principle is true, Poory will be *wronged more* by Wealthy than Needy will be, simply because there is another reason for Wealthy regarding Poory to help Poory than there are reasons for Wealthy regarding Needy to help Needy. This reasoning, I submit, sounds absurd.

Here I might be accused of not having given any strong argument against my hypothetical interlocutor; all that I have done is to spell out their criticisms and stamping on the ground labeling them absurd. The charge is fair to a certain degree, and I don't pretend to have given a conclusive argument in my defence. Yet I think the discussion we had above is at least interesting in the following way: it touches upon a profound point concerning practical reasoning; it is not at all clear what the

relationship between reasons and wrongness is.

One might think, for instance, that the relationship between reasons and wrongness is akin to what Moore had in mind when he talks about a certain 'paradox' of values. He says: '*The value of a whole must not be assumed to be the same as the sum of the values of its parts*' (1903, p.28). The question of whether this is a real 'paradox' aside, I think what he says is very attractive: there doesn't seem to be a 'regular' or 'uniform' relationship between the values of individual parts and the value of the sum of those parts; e.g. things that are not in themselves valuable can by themselves constitute a whole which has immense value.³²

Similarly, one might think that the relationship between reasons and wrongness is one such that you can't *sum up*, in some sense, reasons against doing something and assume, in some regular way, the more reasons there are against doing something, the more wrongful it will be to do it, or that it will be more wrongful to the victim when the act is done. Of course, there is a difference between the point I am trying to make and Moore's 'paradox', in that while it may be intelligible to speak of 'summing up values' to get a 'value of the whole', it is not likewise intelligible to speak of 'summing up reasons' to get 'wrongness': 'summing up' simply isn't the right sort of idea. But this idea of 'summing up' isn't at all my focus; what I want to highlight by bringing up Moore as a parallel to my point is merely the thought that there is something, as Moore claims, *organic* about *both* the relationship between the values of the parts and the value of the whole of parts, on the one hand, *and* the relationship between reasons and wrongness, on the other, despite both relationships being somewhat deemed to be *contributory*, i.e. in both cases the former somehow *contributes to* the latter, though in an organic, not straight-forward way.

³² I thank Rowan Cruft for making me aware of the relevance of Moore.

Now, like mine, Moore's view here is a *negative* thesis, in the sense that despite telling us the relationships we are looking for isn't a 'directly proportional' one, his view offers nothing much on the relationship between the values of parts and the value of the whole. (And, arguably, that there isn't a positive thesis that one can offer is the whole point of Moore's discussion.) I, likewise, do not claim to have a positive thesis beyond what I have already said. But I hope one thing is indeed clear: whatever the relationship between reasons and wrongness, it definitely *isn't* a straight-forwardly mechanical or uniform one. This, I think, is sufficient for me to reject the potential worry for the present purpose.

The *double-reason problem* thus shouldn't pose that big a challenge to my position, because we can recognise that the mere fact that there are multiple reasons for doing or refraining from doing something *per se* isn't, after all, that absurd; what was originally potentially said to be absurd is that the addition of rights-backed reasons leads to some strange results in terms of wrongness, but we have rejected that entailment.

6.1 Preempting some challenges

Before we go on, I want to address two further potential worries about my portrayal and treatment of the so-called double-reason problem. They are not exactly about my solution to it, but more fundamentally these worries cast doubt on whether the double-reason problem can arise in the first place.

The 'if the right itself is reason-giving in some sense then of course the rights-backed demand cannot be simultaneously reason giving' criticism

The first potential worry I want to highlight is one that has, in a sense, been briefly touched upon before I presented the double-reason problem, but at this stage it might be worth revisiting the argument for the sake of clarity. It is the the worry

that, after all, everything is a bit of a red herring because in those cases where we think of the rights *themselves* as mattering normatively, those rights-backed demands actually cannot do any work at all. In those cases, the demands should be considered as nothing more than epistemic reminders, pointing to the existence of some rights, and that any reasons anyone would have related to the right *must originate from the right itself*, and not the demand. For example, one might think that if a victim of torture makes a rights-backed demand against the torturer, there is nothing at all in the demand that does anything normatively; at best, it simply draws attention to whatever reasons there are that the torturer should stop torturing him, *which are reasons he has regardless of the demand being made or not*.

My reply is that I find the suggestion to be somewhat unnatural, a slight mischaracterization of what is going on normatively. As I have already highlighted towards the end of Section 3 of the current chapter, I cannot agree with the suggestion that a right holder's rights-backed demand is normatively empty. Imagine this: if the torturer indeed responds to the rights-backed demand and stops torturing, and he himself cites the rights-backed demand as the reason for his change of mind, we, according to the suggestion here, will have to say that he is misguided. He has not been given any reason to stop torturing at all—everything comes straight from the right itself. This I think quite nicely brings out how strong our intuition is, given the right sort of scenario to tease it out, that resists the suggestion that a rights-backed demands is normatively empty.

In fact, one might think in order to capture the idea that, at least sometimes, a rights-backed demand can *truly matter*, it must be capable of playing a role that is more than merely epistemic; otherwise, we might as well call these rights-backed demands 'reminders'—which, I maintain, sounds rather absurd.

The 'but surely before the farmer makes a demand there is nothing there in terms of

reasons' criticism

The second potential worry I want to address is that one might still insist that in the case of the farmer and the campers, there is *no* so-called 'double-reason' present. One might even go so far as to concede to me that there is, in this case, a reason being given in a robust sense simply in virtue of the farmer's making of the demand to those campers that they leave. Yet, one might still disagree with me over whether there is a double-reason problem. One can do so by holding the following view: prior to the making of the demand, there is, contra my view, actually *no* reason for the campers to abstain from doing anything with regards to the use of the land. This construction of the story of the farmer, in other words, takes the rights-backed, authorized demand that the farmer makes to be an authorization in a truly profound way: that it is the *only* source of any reasons in this case that the campers have regarding the use of the land; in the absence of the farmer's demand, there is simply nothing that the right is doing, so the objection goes.

This is then is how the objection, despite conceding to me that the making of the demand by the farmer can very well be giving reason in a robust sense, holds that there isn't necessarily a double-reason problem: that is because, in cases like this, *the right itself does not give reason*.

Note that this reading leads to a very different result compared to the picture I have been painting. Recall that, after all, I have a modest aim; I have made it explicit that I by no means claim to have supplied a complete theory of rights, and that I *do* want to maintain the sense that it is entirely open to any complete theory of rights to postulate any reason-giving power of the right itself that obtains independently of the making of rights-backed, authorized demands. On the other hand, the criticism we are contemplating here leaves us with no option but to accept that if the demand theory has any plausibility at all, then it cannot just be a partial theory in the way

that I just described. That is because in denying that there is a double-reason problem yet accepting that a reason has been given robustly in the very making of the appropriate sort of demand, the hypothetical challenge here assumes that the only way we can make sense of how the farmer might in this case give a reason to the campers robustly is by assuming that *there isn't a reason for the campers to do anything regarding the right prior to the demand being made*. And since there is, as it were, an 'absence' of reasons independently of the making of the demand, then there naturally isn't a double-reason problem. This supposition, quite plainly I think, rules out the possibility of the version of the demand theory I am defending to be a partial theory, with the potential that it be compatible with other accounts of rights that focus on spelling out the normative force of the right itself without the need to bring rights-backed, authorized demands into the picture.

Now, let us move on to consider why I think the line held by my hypothetical challenger is implausible. First and foremost, I simply cannot see how it is possible in this case to think that the campers do not have any reason to abstain from using the land in the first place regardless of making of the rights-backed, authorized demands by the farmer. That seems to be me to be incompatible with our quite commonsensical understanding of property rights—both in the legal case and the moral case.

To elaborate, my hypothetical challenger here seems to want to present the case of property rights, or at least this particular instance of the farmer's property right over one's farmland, as something that is completely normatively *inert* until it is invoked (i.e. demanded upon). I find that view extremely implausible. It seems very strange to suggest that unless the farmer makes it clear he doesn't want anyone on his land, his right over his land is doing nothing normative whatsoever, and that if ever the campers have reasons not to use the land regarding the farmer's property

right it can only arise as a result of the farmer's rights-backed, authorized demand.³³

Second, and more generally speaking, even if one wants to argue that this peculiar sense of there being no reasons for the campers to do anything prior to the demands being made regarding the farmer's property right is indeed true in this specific case, I doubt this will take us very far. In most cases where we find the demand theory plausible in capturing something about normative significance of rights, I submit it is simply not true that in these cases we simply think of the right itself as giving no reason on its own whatsoever.

In fact, I think those engaging in this debate are likely to be on my side on this particular issue; in particular, I think Darwall and Wallace would, despite our other

³³ Even if one sees this analysis in a Hohfeldian way, I think my point still holds. To go back to the story of the farmer, one way to spell out the challenge with a Hohfeldian flavour is that the demand theory of rights should be understood primarily as analysing a power-right (perhaps accompanied by a 'liberty' to use the field): i.e. the demand theory chiefly *focuses on the permission that the right holder can give to the campers to, say, use my property*. Granting this to be an accurate way of reading what the demand theory is about, my reply remains strong. In this case of the property right to one's farmland, it seems to me quite implausible to think that invoking the notion of a power-right (or even if accompanied by a liberty right) completely captures what is going on in this property right. Surely, a property right of this kind would include, in the Hohfeldian language, something more: a claim-right that others refrain from using the land, for example. This claim-right then could be read as corresponding to what I claim to be the reason-giving power of the right *itself*; it seems to me very plausible that in this case, and in a lot of other cases of rights and not only limited to property rights, a similar claim-right will be present. And if we are good Hohfeldians, we know that to assert that a holder holds a claim-right *is* just to assert that there are duties owed to the right holder; and importantly, there is nothing about the necessary bi-conditional relationship linking the claim-right and the duty such that the duty depends on some making of demands (or exercising of power-rights) to make it genuine. Thus, even if one wishes to read the core insight of the demand theory as the exercising of a power-right, I think the double-reason problem remains, because a claim-right should still be present, and in force, before and independently of the exercising of a power-right.

differences, agree with me. This is evidenced by the strategy they adopt to respond to the double-reason problem. Recall that Wallace, in criticizing, Darwall's position, argues precisely that it cannot be the case that the rights, even if we think of them as being reason-giving when the right holder makes a rights-backed, authorized demand, themselves do not matter normatively. Darwall deals with the challenge by saying the rights-backed demands are, actually, *always* in force, even when the demand is not made, hence eliminating the double-reason problem; it follows *a fortiori* then that even Darwall thinks in the absence of the rights-backed demands being actually made, we do not say that there are no reasons on others about what ought to be done concerning the object of the right. Darwall and Wallace both seem to accept that *there must be something present* to explain the normative significance of a right prior to a rights-backed demand being made—despite the fact that they chose a strategy that I find problematic, as I have previously explained.

Reading the two challenges together

I think the two challenges above, when read together, reveals a deeper-level challenge. If you combine the two challenges, what you get is a binary choice being offered to me: *either* (first category) you have a right where rights-backed demands do not matter in the robust reason-giving way (and, subsequently, any rights-backed demand made are nothing more than mere acts of epistemic reason-giving), *or* (second category) you have a right where the rights-backed, authorized demand does indeed matter, but that the right itself in this case must be 'dormant' or 'inert' in a way that matters not on its own until the rights-backed, authorized demand comes along. And this challenge, which presents itself as a binary choice for me, rules out what I call 'third' category of rights that the hypothetical opponent does not recognise. I want to argue that what I am offered does not seem to me to be an adequate, exhaustive distinction. I fail to see why my opponent seems weary to allow for a 'third' category as an option here, which goes: on top of the two

categories listed above, there can be a class of rights which, first, by themselves matter, and second, the demands that they back also matter. Moreover, given this is simply the bringing together of the two options which my opponent is more or less happy enough to accept, I do not see why this third category poses any new or additional challenge—other than the mere fact that it leads to the problem of double-reason in cases where rights-backed, authorized demands are made, which I argue shouldn't be a problem. And surely to reject the third category of rights *because* it might lead to the feature of double-reason in this class of rights is to reason backwards. It looks almost as if we are trying to modify the reason-giving power of the right itself in order to eliminate the double-reason problem in cases where we grant that rights-backed, authorized demands matter normatively. That seems to me to be the opposite of how we should reason.

Thus, I think we can safely conclude that insofar as we find that at least sometimes when a rights-backed, authorized demand can be reason-giving in a robust way the double-reason problem is real.

7 Returning to the issue of creating a 'new' reason

Before we move on to the last claim of the chapter, there is still an unresolved problem concerning robust reason-giving. Recall earlier, in Section 2 of the present Chapter, I have left it unresolved whether I think what Enoch calls robust reason-giving does in fact give rise to *new* reasons for action. It was a contentious point because, on the one hand, Enoch claims that robust reason-giving is a subspecies of triggering reason-giving while, on the other, he uses the language of 'new reasons being created' elsewhere to describe the normative effect of robust reason-giving. Previously I have merely asserted that it doesn't actually matter what answer I give to the question insofar as my account is concerned, but now, since we have a better sense of the position I favour, I want to back up the assertion.

To pick up the unfinished thread, I think it doesn't matter whether I answered 'yes' or 'no' to the question because I think nothing substantive hinges on this. I say this because of the following reasons: first, given the point of my project, it doesn't really matter whether a *new* reason is drawn out of thin air or just *triggered* in the robust way. Second, the problem I tried to explain away, namely the double-reason problem, would have the same structure be my answer a 'yes' or a 'no'. These are fairly strong indications that the question of whether robust reason-giving gives rise to new reasons for action is a bit of a moot point. Let me explain these two points in turn.

First: Does it matter whether robust reason-giving gives rise to *new* reasons in order for my account to properly flesh out Feinberg's insight? I don't think so. So far, I have already attempted to flesh out the insight by speaking as if making a rights-backed, authorized demand indeed creates *new* reasons for action. What I want to focus on now is how, even if I do *not* assume that, my account can still flesh out Feinberg's insight adequately. Recall Feinberg's point. It is that the reason why being a right holder is important has to do with the normative standing of the right holder, such that when they make certain claims or demands on others, they make them as equals, and these demands actually *matter*. Can a story about robust reason-giving which does not involve the creation of a new reason explain this? I think it is perfectly apt to do so. There is nothing indispensable about the idea of 'a new reason being created' that fleshes out, in practical reasoning terms, what follows from the making of a rights-backed, authorized demand; it is but one way of doing so. Or we can put it this way: there is nothing about the thesis that 'new' reasons are given *per se* that is 'superior' in some sense to reasons being triggered. It is merely a dispute about the *mechanism* the reasons come into being, as it were, rather than the *force* of these reasons. Note too that this line also adequately explains the sense in which these authorized demands are *not* simply epistemic highlighters—for whatever impact these demands have in terms of practical reason,

they are anything but instances of epistemic reason-giving. Thus, it doesn't seem to me whether Feinberg's insight can be spelt out adequately by my account hinges on whether robust reason-giving gives rise to *new* reasons, or triggers some existing but dormant reason; it is simply a moot point.

Second: the double-reason problem remains potent even if we adopt the reading of robust reason-giving which does not give rise to *new* reasons for action. Earlier I have already explained how the double-reason problem arises if we take the claim that robust reason-giving gives rise to *new* practical reason at face value. Now I want to explain why the problem—and my solution to it—would have had the same structure even if we had taken a different view concerning the power of robust reason-giving and assumed it *triggers* reasons instead of *creating* new ones. Recall that the double-reason problem is that there seems to be two sources of practical reasons in a case where a right holder makes a demand or claim about his or her right. The first source is *the rights themselves*, the second is the rights-backed *demands*. What I want to emphasize here is that as long as these two distinct sources remain separate, it does not matter whether robust reason-giving (of which the rights-backed, authorized demand is an instance) gives rise to a reason in either the 'creating new reasons way' or the 'triggering dormant reason way'—the important point is merely that the second source, i.e. the demand, remains. Thus, the fundamental structure of the double-reason is more or less identical, for the demand, via whatever way, remains a source of reasons *on top and beyond the rights themselves*. Furthermore, the solution to the double-reason problem will be similarly structured. None of the arguments I have given before against the double-reason problem assumes the reasons that arise in virtue of the making of the demand must be 'created' out of thin air.

Before we move on, let us draw a number of conclusions concerning our discussion surrounding Enoch. First, I think Enoch's model of robust reason-giving is an

interesting and useful way of looking at how demands made by right holders, backed by their rights, *matter*. They matter because they trigger (or create) a distinctive reason for action on others in a particular way. Second, whether this reason is a ‘new’ reason or merely a reason that is ‘triggered’ doesn’t seem to matter, after all. Enoch’s rhetoric, at times, seems to favour the former formulation although his own analysis of the metaphysics of reason-giving compels him to go with the latter. I have shown that it doesn’t really matter which way it is: sure, if we agree with his analysis of the metaphysics of reason-giving we should stick with the latter—and we have shown that it does not weaken any of the points I have tried to make. But we can also see why one, like Enoch, might be tempted to use the language of ‘new reasons’—it does convey a marked sense of departure from ‘merely triggering reason-giving’. Third, it is *actual* demands that matter—unlike Darwall, I do not think it is helpful in our analysis of rights and demands to treat demands to be ‘in force’ even in cases when they actually aren’t; the very reason why the language of demand is attractive in the first place becomes obscured when we liberally reinterpret the notion of demand. Fourth, while it might be tempting for one to reject this view I favour on the grounds of what I have called the double-reason problem, I think that worry rests on a questionable assumption, and we shouldn’t be alarmed.

Now let’s move on to the remaining claims of the chapter.

8 The openness of demand

The final claim I want to defend in this chapter is perhaps the most contentious one covered so far. I want to argue that an authorized, rights-backed demand can in fact be made against some *unspecified parties*. This follows naturally from another, more fundamental claim, which is that ordinary (i.e. *non*-rights-backed, authorized) demands have the same structure. Hence, what does most of the motivating work in this coming session is a discussion of how some normal, mundane demands are

ordinarily used—in these cases, I claim that they are made against some *unspecified parties*. It will suggest that while they might not be the normal cases of demands, they are most certainly valid instances of demands being made. This argument will have significant implications in the contemporary discussions of human rights. The spelling out of this implication however will have to wait until Chapter 5.

Let us begin with a simple question. Do we *always* make a demand having in mind to whom we are making it towards or what is involved in fulfilling our demand? To take an ordinary case of a demand being issued, a robber walks into a local bank and makes a demand while waving his gun. He says, ‘give me all the money you have! Now!’ So far so ordinary. But do we know to whom he is addressing this demand? I hesitate to give an outright ‘yes’ or ‘no’ as an answer here; ‘sort of’ seems to be the most honest response. Indeed, the addressees of the demand could include the manager, or all members of staff, or even customers who just happen to be there. But does this lack of specificity make the act of the robber any less of a demand? This question, on the other hand, must be faced with a resounding ‘no’; we do not seem to need to know anything about to whom his demand is addressed in order to establish that a demand has in fact been made.

Think again about how we originally characterise the central case of a demand being made. We postulate that, ordinarily speaking, a demand has been made when the person doing this purported act i) wants something done and ii) makes explicit that he wants it done. There is nothing inherent in i) and ii) that requires anything being specified concerning the addressees of the demand.

What this shows, I think, is that there doesn’t seem to be any conceptual constraint on the understanding of an act of demanding that a definite set of addressees of the demand has to be present. The same goes with the precise content of the demand, i.e. what is being demanded: Do we know what is required of the addressee to have the

demand fulfilled? I think not. Again, there doesn't seem to be any conceptual constraint on the 'validity' of a demand imposed by the determination of the content of the demand.³⁴ Imagine a case when a boss of a big company says, 'get this report done for me by Friday.' In one sense it might seem strange to suggest that there is anything unspecified or underspecified about the content of the demand. But let us think this through: does the boss know what is to be required for the report to be done? Anyone with first-hand experience of an office environment would know the answer is more likely to be 'no'. Furthermore, given this seems again to be a case where the demand can well be made to an unspecified collection of addressees, it seems even more far-fetched to assume that the boss knows what individuals have to actually do to get the report done. (Note also that the same is true even if we do not assume that it is the boss, and only the boss, who is in the dark regarding the addressees and the content of the demand. The point is meant to cut deeper: it is meant to hold true in cases where both the addressees and the content of the demand are in some sense *unknowable*. I shall flesh out this point further in Section 9.)

While it might be difficult to convince everyone that this feature of openness is very common or mundane, I think I could at least give enough support to the suggestion that it is genuinely true of some demands.

It is in this sense that I want to defend demand as having what I call an *open* character, in two related ways. Summarily, first of all, demands are open regarding their addressees: there is no conceptual constraint on demands that they must be addressed against some parties in particular in order for them to be valid. Secondly,

³⁴ By validity I am merely referring to whether the purported demand under discussion, after all, is a demand or not. I do not mean to suggest by validity any judgment on whether the demand is 'wellfounded' or 'justified'—that is an entirely different matter. A valid demand in this sense can be unjustified; e.g. the robber's act in the example above.

demands are open regarding their content: demands similarly do not have to be specific in their content in order to be valid, either.

9 Openness of demand: Epistemic or metaphysical?

Here I want to take up one clarificatory point. It might be questioned that even granting what I have been saying is correct, I have merely made an epistemic point, in the sense that all I have shown is that demands are *open on an epistemic level*. According to this reading of my argument so far, what I have defended hasn't got to the bottom of the matter. Indeed, the critic might concede to me that demands can be valid even if it is 'unknown' to whom the demand is addressed, or what the content of the demand actually consists in—but he might insist I have not yet shown that a demand can be valid even if the demand is in a deeper sense *truly* open. Another way to put this critical point against me is that the examples with which I motivated the claim simply fail to show that demands can be *genuinely* open; those stories read more like instances of demands in which the intentions of the demanders are obscured by some challenges, rendering the intentions inaccessible to either the demanders in those stories, or 'us' who are standing at a distance describing the cases.

No matter how one puts the criticism, the general worry relies on the same conviction: in all those cases I have talked about, there must still be *a truth to the matter* about to whom the demand is against and the content of the demand, even if we want to say we or the demander do not know the answers to these questions. E.g. here we might have, due to a lack of specific information and having observed the robbery from a distance, failed to work out who the robber is issuing his demand to. But still, the challenge goes, for the demand to be valid, there must be some specific collection of people or agents who the demand is against *on a deeper level*.

But I argue that should not be a worry. I want to stress that my point raised

previously (Section 8) cuts deeper than the epistemic level. Here I want to highlight how my point is precisely that there isn't a truth to the matter regarding the addressees and content of the demand in all those instances of valid demands. Let me first make that point more forcefully and pointedly with a different example. Imagine the following being said:

‘I am entitled to demand to be fed! But I don’t know to whom I should make that demand, nor do I know how he or they should make it happen. *In fact, I don’t care if it is in principle unknowable to whom I should make the demand and that it is in principle unknowable what those unspecified others need to do to feed me.*’

This I grant might not be the most natural of demands, but it does highlight the point I want to make. A quick explanatory note about what I mean by ‘unknowable’ in the hypothetical quote: by unknowable, I merely want to pick out the sense that there is no truth to the matter. (I leave aside the debate about whether there are ‘unknowable truths’ in these sorts of matters—I am going to assume that there isn’t: and to call something ‘unknowable’ is a more natural way to express the thought that there is no truth to the matter.) The above hypothetical quotation shows that it is consistent for a demand to be valid while being open at the same time—most important of all, it is not merely open on the epistemic level: it is genuinely open, in that there really is no truth to the matter concerning who the addressees and what the content of the demand are. More generally speaking, I think it is false to assume that a demand is valid only if the identity of the addressees of the demand and the content of the demand are in principle knowable. In contrast, the opposite seems true when we reflect on how we ordinarily use the notion of demand. Recall the boss who demands, ‘I want this report done by Friday.’ Of course, there is no reason to assume that the boss *knows* what is to be done for the report to be compiled and who this demand is against. Furthermore, and this is the point I am reiterating here,

there is also no reason to assume that all this is *in principle knowable*: the more plausible account seems to be that, after some deliberation, certain members of staff would come to *be* the addressees and what each is required by the demand would be determined. But at the moment when the demand is made, all these are ‘not there’, as it were. The demand is just that, pure and simple: get the report done. I think this shows that the under-determinacy of the identity of the addressees and content of the demand should *not* feature in our evaluation of the validity of the demand itself.

The same point is also true of the story of the robber. To sharpen the focus here, imagine the story happening in a context where things are more, quite literally, open. If the robber this time is holding a gun and demands money from people in an open square, perhaps one with no clear boundaries, who exactly are the addressees of the demand when he yells ‘hand over your money!’? Those he has eye-contact with? Those who can hear him? What about people who are a bit further away from the robber and are strictly speaking not in the square? There is, I believe, no principled way of providing an answer to that question: in other words, there is no *a priori* method to spell out who the addressees *really* are.

And this leads me to a related point. What if someone insists that in the case of the boss, the boss remains *in some sense* making a demand to *some* people, e.g. his employees? ‘But obviously,’ one might remark, ‘the boss is making that demand to *someone*. His employees, or some managers directly under him—*someone*.’ Does it affect my argument? I don’t think so. All I am defending here is the rather weak claim that a valid demand can be made against some *unspecified parties*, and that there maybe no *definite* addressees when the demand is made—it is important to note that to say that the demands can be open doesn’t preclude us from saying anything at all about the addressees. It is of course true that, in this case, the boss is demanding things from *someone*—but then, as I have been claiming, it’s not quite

clear who they are in a strict sense. This minimal claim, I think, shouldn't be treated as revisionary or controversial.

After looking at how all these different cases work on more than a merely epistemic level, we should really turn the question around and challenge the presupposition the criticism embodies: that it is somehow an odd thing for demands to be open in the way described to begin with. Why assume that when it comes to identifying the addressees of a valid demand, there will be rigorous clarity and precision? We must not let our quest for theoretical clarity obscure the way things *really* are. One should not insist that a theory, and the concepts involved in the building of the theory, to be rid of this kind of ambiguity at the expense of an accurate description of things as they are. Why should this uncertainty make us doubt the fact that, say, the robber is indeed making a demand in that instance? Why assume that identifying the addressees *in flesh and blood* (a James Griffin phrase) is tied to the validity of a demand in the first place? The fact that there can be different but equally plausible ways of spelling out who the addressees of a valid demand really are is already sufficient for showing that these addressees don't have to be specified in flesh and blood for a demand to be valid. Think about the robber case again. All those possibilities—that the addressees are those close to him, those who made eye-contact with him, those who are, according to some standards, in the park—suggest that the identifies of the these addressees in question is essentially unspecified, in the sense that one simply cannot mark out a clear group of people and label them the addressees of a demand.

Of course, this view comes with complications. For example, if demands are indeed open, there are difficulties in explaining the normative implications of open demands in terms of robust-reason giving (especially given how much is presupposed about the receiving-party of robust reason-giving in terms of her ability to 'recognise intentions'). I think the worry is legitimate: as hinted at in

Section 7 of this Chapter, I shall return to this point in Chapter 5. But in any case, I think we should not allow these complications to stop us from endorsing the highly intuitive claim that demands are, in fact, open. We should fight hard to retain this thought in an account of rights that places heavy emphasis on the concept of demand.

10 Implications for Hohfeldians

One final remark on the importance of the openness of demand: to pick up on a theme I touched upon towards the end of the Introduction, if one indeed agrees with me that demands can be open in the way I just sketched, and, further, if one thinks this feature of demand tells us something about the very nature of rights, then I think this might have interesting, and potentially groundbreaking, implications for our thinking about the Hohfeldian analysis of rights. I shall return to this at the very end of the thesis (Section 7.3, Chapter 5) and give a more detailed analysis after we have looked at how the openness of demands features in our discussion of human rights, but for now let me sketch quickly the outline of my argument. The idea is that if one of the features of rights is that rights back up the demands their holders make, and these demands, given they are ‘open’, can be made against unspecified parties, or a vague collection of agents, then I am not sure whether the Hohfeldian analysis of rights can accommodate this. As I shall explain in Section 7.3, Chapter 5, I think the Hohfeldian analysis itself is predicated upon a view about what rights can be: that it has to be something between *concrete parties*. It is obvious if one thinks about how all Hohfeldian incidents are defined and explained—they are all, and are designed deliberately to be, (legal) relations between two specified parties. If my view on the presupposition of the Hohfeldian analysis is correct, I think my arguments so far at least pose a legitimate question concerning our confidence, which is very high among many rights theorists, in the Hohfeldian regime. I will leave this issue for now, and return to it more pointedly at the end of Chapter 5.

11 Conclusion

This Chapter was by no means short, because it contains all the fundamentals of my argument in this thesis, and is meant to be the theoretical reference point of my subsequent discussion.

This chapter looked at four claims, which, put together, summarise my view rather neatly. They are as follows:

1) In Section 1, I explained what I mean by a demand, and what kind of demands are going to be most relevant for our purpose. It is rights-backed, authorized demands that we are going to study in depth.

2) In Sections 2-6, I argued that one way of explaining why rights-backed, authorized demands matters is to think of them as instances of what Enoch calls 'robust reason-giving'. I have explained, in quite considerable depth, what they are and how they contrast with other kinds of reason-giving. I have also shown why I think rights-backed, authorized demands fit with this model. In short, I have explained one of the ways according to which a right holder's demands concerning her own right matter normatively by looking at what a rights-backed, authorized demand amounts to in terms of practical reasoning.

3) In Section 7, I previewed another way according to which a rights-backed, authorized demand matters. I leave out the main exposition of this assertion until later (Part III), but in this Chapter I have explained that I think the very act of making a rights-backed, authorized demand matters because of certain *values* associated with these acts of demanding. The spelling out of this special kind of value will come later.

4) In Section 8-9, I discussed another aspect of my view that is rather controversial. I

argue that it is, contrary to what might appear to be the case, not true that for a demand to be 'valid', the addressee of the demand and the content of the demand must both be specified. The justification of this claim involves many quite natural uses of the notion of demand; I argued that there is nothing at all unusual about my suggestion. I relied on a range of examples to substantiate my claim.

Finally, on top of the principal claims, in Section 10 I highlighted how my view has already gone some way in backing up my assertion in the Introduction (Section 4) concerning my reservations about Hohfeld. The main criticism of the Hohfeldian analysis of rights will be explored in Section 7.3, Chapter 5; but the form of the suggestion, which I have discussed in this Chapter, is a rather simple one: the way I have been discussing rights seems to be *precluded* by a Hohfeldian analysis, and if one finds my discussion meaningful (even if one finds it 'wrong', one can still see perhaps that there is value in having this discussion) then one is indeed left to question the confidence the philosophical community has in the Hohfeldian analysis.

Chapter 3

In this chapter, I want to contrast my view with some other so-called ‘demand theories’. This is going to be a difficult chapter to write, because it isn’t at all clear what the ‘demand theory’ of right as a label actually denotes.

I am first going to say a little about why the state of the so-called demand theory of rights is so messy. Then, I will move on to comparing my account with other similar accounts out there. I will begin my comparison with Stephen Darwall’s account, before moving on to John Skorupski’s. Both of their proposals are very different from what I have to offer. It will turn out, I claim, there is little similarity between what I propose and these accounts, and it is perhaps not really doing any one justice to apply the label of demand theory of rights to cover all these accounts.

1 The so-called demand theory of rights

Let me first begin by noting how side-lined the so-called demand theories actually are in the literature on rights. Not much has been written about them. In fact, apart from Skorupski, who had given a necessary and sufficient condition of rights in terms of (permissible) demands, others who had written about rights and demands, including Joel Feinberg (1970), Jeremy Waldron (2000) and Stephen Darwall (2006), make no such attempts at all. This suggests how little they are thinking about making a contribution in the terrain of debates over theories of rights as the debate is standardly understood. An insightful point of reference from which we can begin is Leif Wenar’s entry in the *Stanford Encyclopedia of Philosophy* on ‘Rights’—a piece from which the name ‘demand theory’ originates (Wenar, 2011). In support of my claim about how relatively sidelined the so-called ‘demand theories’ are, I submit the following discourse analysis: Wenar has only given these accounts a

one-paragraph treatment, with no more than two sentences for each account. In that paragraph, Wenar quoted Feinberg, Darwall and Skorupski: none of who has, strictly speaking, a conceptual analysis of rights in any rigorous way.³⁵ Contrast that with Wenar's treatment of the will theory and demand theory, which is several times longer. This is indicative of the fact that this whole way of thinking about rights is outwith the mainstream literature. It is the aim of this thesis that this be changed.

It is also rather difficult to formalise this cluster of theories (by 'formalising' I mean to come up with certain theses that members of the camp endorse to a large extent) we call demand theories. This is, I think, due to the fact that none of these theorists sees themselves as primarily engaging in the debate over rights. Let's take Darwall's account as an example. In his (2006), he makes it quite clear that his project is to explain morality *in general* in terms of the second-personal standpoint. His so-called theory of rights is thus, as such, not a theory of rights. This means quite a bit of

³⁵ Wenar's paragraph is quoted here in full: "Demand" theories fill out the idea that, as Feinberg puts it, "A right is something a man can stand on, something that can be demanded or insisted upon without embarrassment or shame. (1973, p.58-9)" For Darwall, (2006, p.18) to have a claim-right, "includes a second-personal authority to resist, complain, remonstrate, and perhaps use coercive measures of other kinds, including, perhaps, to gain compensation if the right is violated". On Skorupski's account (2010a, Ch.14&16) rights specify what the right-holder may demand of others, where "demand" implies the permissibility of compelling performance or exacting compensation for non-performance. Like the will theory, such accounts center on the agency of the right-holder. They do not turn on the right-holder's power over the duty of another, so they do not share the will theory's difficulty with unwaivable rights. They may, however, have more difficulty explaining power-rights. Demand theories also share the will-theory's challenges in explaining the rights of incompetents, and in explaining privilege-rights.' (Wenar, 2011).

Interestingly, Skorupski's bi-conditional detailing the existence condition of rights is missing in these quotations.

preliminary work has to be done before it will become obvious how I think my account is different from Darwall's.

2 Darwall's demand theory of rights

In this Section, I want to examine Darwall's view on rights. This allows me to tease out how my view is different from his, an exercise that constitutes Sections 3&4. To achieve this, we will look at his *The Second-Person Standpoint* (2006) and some other articles he has written (e.g. (2007a), (2007b), (2010), and (2012)). We cannot, however, go straight into his view on rights, because Darwall's view on rights is shaped heavily by his moral philosophy by and large. We need to understand more of his view in order to give the subsequent discussion a context. It is to this that we immediately turn.

2.1 'Second-personality'

The difficulty in explaining Darwall's moral philosophy lies in the very structure of his view: he thinks what lies at the bottom of morality itself is a cluster of second-personal concepts. They are fundamental in an interconnected, circular way, making it impossible to find a fixed point to start the elucidation from. Thus, what I am going to do is first to crudely paint a picture before going through a lengthier exposition.

The crude picture begins as follows: the second-person standpoint is a kind of perspective that agents adopt. By adopting this perspective, the agent assumes that she herself has what Darwall calls 'second-personal authority'. The having of this second-personal authority, i.e. the adopting of this second-personal perspective, is something *presupposed* by 'giving second-personal reasons': this act Darwall calls

'second-personal address'.³⁶ All these concepts—'second personal-authority', 'second-personal reasons', 'second-personal perspective', and 'second-personal address'—point to the very same thing: the difficult-to-articulate special nature of the relationship between agents that have something normatively 'special' going on between them. (Darwall sometimes calls this 'specialness' *second-personality*, which is how the heading of this subsection comes about.)

The crude picture is merely formal; it tells us how Darwall's jargon relate to each other but we haven't got anywhere substantive. Let us proceed by considering R. Jay Wallace's summary, which gives us a better overall sense of Darwall's view:

Stephen Darwall describes the second-person standpoint as “the perspective you and I take up when we make and acknowledge claims on one another’s conduct and will” (2006, p.3). *Claims are apparently understood by Darwall to be sources of a distinctive kind of reason for action, which Darwall likewise refers to as second-personal.* “What makes a reason second-personal is that it is grounded in (*de jure*) authority relations that an addresser takes to hold between him and his addressee” (2006, p.4). These distinctive, authority-based reasons are created by second-personal address, whereby a person with the relevant authority issues a demand to a specific addressee. Second-personal address purports to direct the addressee practically rather than merely epistemically; it generates immediate claims on the addressee’s will, rather than reporting epistemically on normative facts or relations that obtain independently of the issuance of the demand or claim (2007,

³⁶ Whether the second-personal authority actually obtains is a further, normative, question: it may, or it may not. But by adopting the second-personal standpoint, the agent must assume, presuppose, or take it to be the case that she has second-personal authority (though she might be wrong about that). See (Darwall, 2006, fn4, p.4).

p.24. Emphasis mine).

The most important point concerning what it is to have practical, second-personal authority to demand or make claims on others is that the agent is reason-giving or even reason-*creating* in a second-personal way; an agent's claim is, as Wallace highlights, a 'source' of reason. The giving of second-personal reasons does not merely refer to something that already is a reason independent of the address. It is something *new*. (This is essentially the same kind of distinction we have already covered when we tried to understand the distinction between epistemic reason-giving and non-epistemic-reason-giving according to Enoch in Section 2, Chapter 2.) To understand Darwall's view, one must grasp the importance of this point. Consider too how Darwall himself explains how second-personal addressing works:

The authority to address second-personal reasons for acting... is fundamentally second-personal. When a sergeant orders her platoon to fall in, her charges normally take it that the reason she thereby gives them derives entirely from her authority to address demands to them and their responsibility to comply. This is not a standing, like that of an advisor, that she can acquire simply because of her ability to discern non-second-personal reasons for her troops' conduct... *The sergeant's order addresses a reason that would not exist but for her authority to address it through her command.* Similarly, when you demand that someone move his foot from on top of yours, you presuppose an irreducibly second-personal standing to address this second-personal reason (2006, p.12).

There is another fundamental concept within the inter-defined circle: responsibility. Though it is less relevant for our current purpose, we should cover this for the sake of completeness. Responsibility, Darwall holds, is 'implied' by being the addressee of

a demand or claim made with practical, second-personal authority; on the other hand, responsibility also implies second-personal authority in the sense that to speak of someone as being responsible in doing something *is just to say* that the person is under some others' practical, second-personal authority.

Darwall calls the above the 'inter-definable circle' and claims that 'there is no way to break into this circle' from without. Propositions formulated only with normative and evaluative concepts that are not already implicitly second-personal cannot adequately ground propositions formulated with concepts within the circle (2006, p.12). A plausible conceptual map, I think, would look something like this (with '↔' suggesting a kind of explanatory direction that goes both ways):

Responsibility ↔ Second-personal Authority ↔ Second-Personal Reason

2.2 Darwall on Rights (the simple story)

But what about rights? So far, among these fundamental concepts that constitute the basis of Darwall's view, rights haven't yet made their appearance. Curiously, in his main work, (2006), it isn't until a couple of sections later that rights are introduced. (That section begins: 'Another central ethical concept within the second-personal circle is that of a *right*, most obviously, of a claim right' (2006, p.18).) This is slightly puzzling because one assumes from what Darwall said previously that the exposition of the inter-definable circle of concepts had already been completed.³⁷ But putting that textual note aside, the *Precis* to the book (2010) is much more straightforward about the importance of rights, and it is the most important source,

³⁷ Interestingly, in Darwall (2007a) he just conveniently introduces rights as part of the inter-defined circle of second-personal concepts. I will overlook this textual difference.

I think, to truly understand what Darwall's views on rights *really* are:

By the "second-person standpoint," I mean the perspective you and I take up whenever we address (putatively valid) claims or demands to someone, whether explicitly, in speech, or implicitly, in thought, whether to others or to ourselves (as in self-addressed feelings of guilt). *Suppose, for example, that you claim something as your right, say, that someone not step on your foot or, after his having done so, that he remove his foot, answer for having stepped on yours, apologize, and so on. In so doing, you presuppose an authority to demand certain conduct of him and to hold him accountable for complying with your demand.* As Joel Feinberg pointed out, having the authority to claim or demand something of someone is part of what it is to have a right to his doing that thing. In having a right to others' not stepping unbidden on your feet, you have the authority to demand that they not do so and to hold them answerable if they do.

Your having this right creates a distinctive kind of reason for others to avoid your feet. Second-personal reasons, as I call them, depend conceptually on the authority to make (and so address) claims and demands, whether, again, explicitly in speech or implicitly in thought, as, for example, in Strawsonian reactive attitudes such as resentment, indignation, moral blame, and guilt, which all essentially involve some claiming or demanding aspect. For instance, your having a right that others not step on your feet unbidden entails that you have warrant for feeling resentment if they do. And your authority to claim or demand this treatment from them gives others a distinctive reason to comply, a second-personal reason. It is the element of address that makes these reasons "second-personal" in something approaching a grammatical sense; they invariably have an implied addressee (even, again, when the addressee is oneself, as in the feeling of guilt). (Thus "second person" does not entail

“second party.”) (2010, p.216. Italics mine.)

Here, Darwall starts off by using rights to illustrate second-personality, as discussed in Section 2.1. To demand things as a right holder, the second-personal standpoint is said to be presupposed; and what is special about being a right holder is the second-personal authority that comes with it. His main point from the quote can probably be summarized by Darwall's own words elsewhere when he unambiguously says, '*... if you have a right, then you have a standing to make a special demand against people who might step on your feet—you have the authority to resist, claim compensation, and so on*' (2006, p.18. Italics mine). (There is an issue here regarding Darwall's view; it is unclear from the quotations above whether Darwall really intends for it to be the 'making of the demand' or the 'having of the second-personal authority to demand' that matters normatively—an issue we have already briefly looked at in Section 5, Chapter 2. I will return to the unclarity on this point, which is embedded in his view in general, in greater detail again in Section 3.)

At this point, we can tentatively construct a Darwallian condition of rights as follows. Since Darwall is essentially claiming that if there is a right, there will be second-personal authority as well as a standing to make special demand against others, he is in effect claiming that a *necessary condition* for a right to exist is the presence of second-personal authority and the standing to make demand or claims against others. We can state Darwall's version of a demand theory of rights as follows:

Demand Theory of Rights (Darwall) If X is a right holder (against Y), X has the second-personal authority over Y to make a demand against Y regarding the content of the right.

So far so good. But can we also read a sufficient condition for rights out of Darwall's view? To rephrase the question, should we think that Darwall holds that whenever X has second-personal authority over Y, X has a right over Y? One might quite reasonably assume so, since Darwall talks about rights being part of the inter-definable circle, *and* that every concept in that circle, in his own words, 'implies all the rest'. So rights and second-personal authority must imply each other, hence forming some kind of necessary and sufficient relationship between them.

However, nowhere in the book does he express that thought explicitly. On the contrary, there is, somewhat bizarrely, textual evidence to suggest that Darwall is unsure about the said sufficient condition. He is actually unsure about whether all instances of second-personal authority entail a (claim) right. In cases of gratitude for example, he wants to say that the language of rights seems out of place, yet there is, he thinks, quite certainly something 'bipolar' and second-personal going on (2012, p.343, fn.29). It will be therefore more cautious *not* to read Darwall as holding that 'If X has second-personal authority against Y regarding O, X is a right holder of the right to O (against Y)'.

Thus on the surface, Darwall's view on rights and mine are somewhat similar. Recall the most fundamental point encapsulated by Feinberg's insight is that a right holder's claim or demand *matters*. Darwall, on the face of it, seems committed to this point. In Darwall's language, the farmer's demand in the story we often return to matters because of the second-personal authority the farmer enjoys as a right holder. Due to this kind of special authority, the farmer gives a reason second-personally, and this form of second-personal addressing (which is similar to what I call a rights-backed, authorized demand) captures the importance of rights.

3 Differences with Darwall (1): Darwall's project and when a demand is 'in force'

However, the previous, only-scratching-the-surface analysis obscures a deep commitment Darwall has on rights that only becomes apparent when we try to dig deeper—there are issues even in the long quote in Section 2.2, as I have already flagged up. This deeper commitment is the root of one of the major differences between my view and Darwall's in terms of when a demand is 'in force' which was already partly discussed in Section 4-5, Chapter 2. In this Section, I want to tease out this deep commitment Darwall has and why he has it, and to argue why I need not subscribe to it.

What Darwall eventually wants is *to subsume all of moral obligations under the second-personal standpoint* (i.e. arguing there is no way to make sense of moral obligations unless *via* second-personality)—and it is important to see that this is not part of my project.³⁸

For Darwall, there are two kinds of moral obligations: obligations 'owed to someone' and obligations 'period'.³⁹ The former is more obviously connected to the second-personal standpoint; this seems to be captured nicely by our summary of Darwall's view in Section 2.2. It is the project of making sense of obligations period

³⁸ There are many other things Darwall wants to achieve in his (2006), too. One prominent aim, though irrelevant to our current discussion, concerns a Kantian justification of morality. For an example of a discussion on this, see Korsgaard (2007).

³⁹ A distinction Darwall most clearly drawn in (2012), following Michael Thompson. See further Thompson (2004).

via second-personality that is most troublesome and contentious. In his own words,

... when someone has his foot on your foot, there is his obligation to you and your consequent right, on the one hand. And then there is, *on the other, the fact that he is violating a moral obligation period*. And according to me, both are irreducibly second-personal matters. We cannot adequately understand either without the idea of an authority to address claims and demands. This may be clearer in the first instance, since the obligations are themselves to another person and thereby involve that person's distinctive standing, for example, to object, to demand reparation, to forgive, and so on. *But as I see it, the latter is no less second personal, since we can't understand the idea of moral obligation independently of that of an authority to hold responsible and address demands for compliance* (2007b, p.62. Italics mine).

But how is that possible—given the very nature of these obligations (i.e. obligations period) are defined as obligations that are *not* owed to anyone? To describe such an attempt to explain all moral obligations, period or otherwise, and in fact all of moral philosophy, through the second-personal standpoint as ambitious is an understatement. Gary Watson, in his discussion piece of Darwall's book, summarises Darwall's project in the grandest possible terms, giving the aim of the project a very helpful context. As Watson sees it, the project is almost impossibly bold:

Although [Darwall] doesn't advertise it in just this way, we can see Darwall's book as a response to Elizabeth Anscombe's famous complaint against "modern moral philosophy." Anscombe charges our discipline (and perhaps our moral culture) with a kind of incoherence. Having abandoned traditional theological assumptions, it continues to employ concepts to which it is no longer entitled. What remains is a moral 'ought' with the supposed special force of law but

without a lawgiver... One of the main achievements of Darwall's book is that it provides an answer to this challenge. The authorities to whom modern moral consciousness appeals are simply *you and I* (2007, p.37. Emphasis mine).

If Watson's reading of Darwall's view is correct, it is the gesturing towards this idea of 'you and I' that marks my biggest departure from Darwall's philosophy. What this sense of 'you and I' is meant to encapsulate is a very peculiar sense of an almost hypothetical or artificial 'moral community' (and it serves as a reply to Anscombe's complaint). The entity with which second-personal authority resides, making *all moral obligations* (including obligations period) second-personal, is this moral community, of 'you and I', or every single being who possesses what Darwall calls 'second-personal competence'. And it is also this community that allows us to understand obligation-period as, too, second-personal. To go back to a point covered in Sections 4&5, Chapter 2, Darwall explains:

Now what I say in the book is that we might think of moral demands as being "in force" if members of "the moral community" are prone to make them. *But the moral community as I understand it is not any actual community composed of actual human beings. It is like Kant's idea of a "realm of ends," a regulative ideal that we employ to make sense of our ethical thought and practice.* So, as I am seeing it, it takes neither an explicit actual demand nor a demand that is implicit in actual human beings being prone to make it, either individually or collectively, in order for a claim or demand to be in force. *The demand is made by the "moral community" and by all of us insofar as we are members.* We might therefore understand the moral community as being prone to the reactive attitudes in a contractualist way, for example, taking it that moral demands are "in force" if no one could reasonably reject principles that would warrant them, or if these principles would be chosen by representatives from a point of view

that expressed the idea of respect for all persons as having equal second-personal authority (2007b, p.64-5. Emphasis mine).

To use this sense of a moral community, which is not, actually, 'actual', to explain or make sense of all moral obligations and of moral philosophy is, arguably, *the* point of Darwall's work. It is worth noting here that Darwall is quite unclear on what he means by 'being prone to demand'. This idea is something Darwall takes from Peter Strawson, who he quotes as saying 'the making of the demand *is* the proneness to [reactive] attitudes' (Strawson, 1986, p.92-3, cited in Darwall, 2006, p.244, fn.2); and the having of reactive attitudes *is*, itself, to make demands implicitly (Darwall, 2006, p.17). An explanation of what this complex expansion of the concept of demand—in particular what 'prone' is—amounts to is, unfortunately, absent. In cases like this, readers are left to make the best of the text. Wallace's interpretation assumes that Darwall is making a point about *dispositions*: in fleshing out how Darwall solves the problem of the status of a right holder when the right holder herself fails to issue demands (cf. my previous discussion on the double-reasons problem in Section 6, Chapter 2), Wallace writes:

Darwall explains [how demands can be 'in force' even when not being explicitly made] by suggesting that the *prone*ness to hold people accountable through reactive sentiments itself involves an element of second-personal demand or claim. Even if the demand is not explicitly addressed by the person whose toe you step on, it is present in the disposition of that person—together, perhaps, with other members of the "moral community"—to respond to certain things you might do with resentment, indignation, and other such emotional reactions' (Wallace, 2007, p.27).

That is, Wallace assumes by 'being prone to demand' Darwall means something like

'is disposed to demand'. This sounds like a quite plausible way of reading Darwall's view, but plausibility is the best we have.

My thesis, fortunately, has nothing to do with this grand project. Despite having a common interest in making sense of the connection between rights and demands, this commonality between us does not get anywhere near Darwall's more ambitious philosophical aim. I will, however, just mention one—in my mind, fatal—objection to Darwall's project, and then move on. The objection is a version of what I already hinted at in a previous chapter when we looked at how the problem of 'double-reasons' arises. It is essentially a criticism of Darwall's confusing use of the notion of 'demand'. As Watson remarks,

It is in an important respect misleading to say, as I did earlier, and as Darwall sometimes does, that second-personal reasons rest on others' authority to make valid demands. *Darwall needs a distinction between "demands" that remain in force whether or not one issues them and demands that do not.* My reason to return your book is that you've asked for it back, not that you have the authority to do so. A different account must be given for my reason not to trample on your garden or your foot, though, since you've probably never addressed any such demand to me. The wrongness of what I do in this case cannot consist in my violating a demand that you've made. Nor can it consist in your possession of the authority to prohibit me from behaving in this way. For if you actually permit me to trample your foot or your garden, then presumably I am not violating any obligation to you, even though you retain the authority to forbid me to do so.

It seems that Darwall's explanation of the distinction between these importantly different kinds of moral requirements and corresponding

second-personal reasons—those that arise from actual prohibitions and demands and those that do not—appeals to certain implicit understandings and hypothetical conditions. But as far as I can tell, it is never well worked out (2007, pp.39-40. Emphasis mine).

I share Watson's worry completely. To flesh out Watson's worry in full: it is just unclear where the 'normative force' of demands comes from in Darwall's account of second-personal reason-giving. There are a number of options, and they all seem to be assumed at various places: Does the normative force come from the *actual demand* being made?⁴⁰ Or from the *authority* to make the demand?⁴¹ Or from *being prone* to make a demand—which Darwall, following Strawson, takes to *be the same as making the demand*?⁴² Or—most peculiarly—does it come from the *proneness* of the making of the demand by a *non-factual moral community* like a 'regulative ideal' that is the source of normativity?⁴³ The answer is unclear. Thus my fundamental objection to Darwall's bigger project is that all these uses of 'demands' are lumped together. It is my view that they should not be.

This concludes the first difference I see myself as having with Darwall's view. My

⁴⁰ This seems to be the source of normative force implied in the most basic example of one's toe being stepped on. See, e.g., Darwall (2006, p.7).

⁴¹ As already cited, Wallace reads Darwall this way in (2007, p.27). Darwall also appears to use this reading in the quote already recapped in Section 2.2. See his (2010, p.216).

⁴² See Darwall (2006, p.244, fn.3)

⁴³ Darwall's reply to Wallace makes this very plain in (2007). See especially pp.64-5, where Darwall compares his view to a Kantian 'realm of ends', which I have already cited earlier in this Section.

account says nothing about the nature of morality or the nature of all obligations. These are perfectly reasonable aims that Darwall could pursue, but they should not concern us in this thesis. I also hope it is now obvious that Darwall and I use the notion of demands very differently: his liberal and at times confusing usage, especially his treatment of when a demand is 'in force', very much driven by his bigger project, marks a major departure from my view.

4 Differences with Darwall (2): Addressees of demands

Another difference between Darwall's view and my own is that my view does not hold that for a demand to be 'valid', the demand has to be addressed to specific others. That is because if we reflect on how the notion of demand is used, it is often not clear—and it is more than a purely epistemic point—who the demand is against. This, of course, is something I have stressed in Section 8, Chapter 2. At least on the face of it, Darwall's account cannot accommodate this point. Most of the time, he speaks of the importance and necessity of there being addressees for second-personal address to be possible. Furthermore, Darwall maintains that second-personal reasons are 'fundamentally agent-relative' (2006, p.8). It may then be natural to assume that, on this point, Darwall and I are on completely opposite sides.

But it is not clear whether this makes Darwall's account, strictly speaking, incompatible with mine. Recall what I have explained previously: my claim is not that a demand can be made against no one, *period*. I do accept that a demand made in a 'vacuum' without any addressee is a rather difficult thing to make sense of. Rather, my claim is, I think, a lot more plausible: a demand can be made against no one *in particular*. What that means is that there is, *as a matter of fact*, a lot of vagueness in the identity of addressees when we make demands (be they

rights-backed, authorized or not) against others. Given my claim is a lot more modest than claiming that demands can be made to no one, *period*, there is then room to make Darwall's view closer to mine: it is conceivable that we can read Darwall in such a way that he allows for the identity of the addressees of second-personal addressing to be vague in the way I think it is. While the general direction of his writing seems to suggest that he would resist this manoeuvre, I want to leave open the possibility that he *could* be defending something closer to my view on this point.

Note that this is more than a pedantic point. The importance of this will be revealed in Part III when we look at how my account interacts with the contemporary human rights literature. I shall return to this point then.

5 Addition issues with Darwall's view

Finally, before we move on to the next section, I want to flag up a final worry I have with Darwall's take on Hohfeld. I think Darwall uses the Hohfeldian analysis in an unhelpful and misleading way.

I am puzzled by Darwall's presumed Hohfeldian justification of rights being second-personal. More precisely, I am unsure why Darwall thinks the second-personality of rights is 'implicit' in Hohfeld. It is not obvious to me that Hohfeld implies what Darwall thinks it does. To take Darwall's own example when he makes this point, let's consider what he says about what is entailed by a Hohfeldian claim-right. He says:

This⁴⁴ is implicit in Hohfeld's famous formulation. According to Hohfeld,

44 What 'this' refers to is unclear in the text. I assume Darwall uses this to denote 'that if you have a right

someone has a claim right to another person's doing something only if that person has an obligation to her to do that thing. And this consists not simply in its being the case that the other ought or has good and sufficient reasons to do it, even that the reasons for him to do it are exclusionary in Raz's sense of not being appropriately weighed against otherwise competing considerations, *but in the claim-holder's authority to demand compliance and, perhaps, compensation for non-compliance.*' (Darwall, 2006, p.18)

It seems to me that Hohfeld's claim-right does *not* imply second-personal reasons because it appears 'having a claim-right' and 'having the authority to demand compliance and compensation etc.' are actually very different things, whereas Darwall seem to think we can automatically get one with the other. The Hohfeldian structure, as I explained in Section 4, Introduction, is (merely) a stipulated logical structure comprising of some Hohfeldian incidents, including that of a claim-right. *It is silent on what happens, or ought to happen, when a claim-right is violated or who has authority over a claim-right.* Consider the following. We can perfectly well imagine a normative system in which A's claim-right against B that B does X *does not* give A the kind of authority that Darwall has in mind. Even in this system, it is of course true that B has a duty to do X that is directed *to* A. This is what the Hohfeldian language tells us, and this is all that it tells us. But the Hohfeldian language by itself by no means entails that the *owed to* locution *necessarily* implies that A has the authority to demand compliance and compensation when B fails to do X. A's having a claim-right against B that B does X is perfectly compatible with, say, C (perhaps an arbitrator, or a legitimate state) being the one with the power to enforce A's

then you have a standing to make a special demand against people who might step on your feet—you have the authority to resist, claim compensation, and so on,' as this is the last clause that appears in the paragraph immediately before 'This'.

claim-right against B, or to order compensation in case of violations. Here is the point where Darwall might object, for he would insist that A and B, by being in a relation of claim-rights, are indeed locked in the kind of second-personal relationship. He can of course defend that view, but my contention is that there is no reason to assume that he should expect this move will have Hohfeld's blessing.

My comment here serves as a reminder of how non-committal about substantive theories of rights Hohfeld's structure really is, and is a general warning against theorists working on rights to claim support for their substantive views about rights from Hohfeld. The Hohfeldian analysis is often *silent* on such matters. This echoes the general worry, as highlighted in Section 4 in the Introduction, I have about the Hohfeldian enterprise—in many cases, it distracts us from the real issues. Here we have an example of such distractions. Darwall's argument for second-personality must stand or fall on its own merits; casting a Hohfeldian light onto his view does not justify his position.

6 Skorupski's demand theory of rights

Let us now turn to look at how my account is similar to, but in significant ways different from, Skorupski's account of rights. Skorupski's account of rights is usually cited from his *The Domain of Reasons* (2010a), and this will thus be our primary text in our discussion of his view.

Skorupski's recent philosophical ambition is, perhaps more so than Darwall's, enormously grand—so grand that, in fact, Skorupski himself suggests, in the Preface, that readers of his (2010a) should omit certain parts of the book altogether according to their own interest. It is with this advice in mind that I do not engage with his wider project. That said, it will remain useful to give a bit of relevant

context to his view on rights.

The part of his project that is most relevant for our purpose is Part III of his (2010a); for a more self-contained discussion of his view on rights, his relatively short essay, 'Human Rights' (2010b), and his more recent article, 'The Triplism of Practical Reason' (2012) are also important points of reference. Very simply put, Skorupski believes that there are three irreducible, fundamental sources of normativity in practical reasoning. They are the 'Bridge Principle', the 'Principle of the Good', and the 'Demand Principle'. I will very briefly explain the first two before explaining what the 'Demand Principle' is in greater detail and how it is relevant to our discussion.

The Bridge Principle is a 'bridge' in the sense that it *bridges* 'sentiments' with 'actions': it holds that whatever fact that gives reasons for an agent to feel in a certain way also gives—and precisely because it gives reasons for the agent to feel that way—reasons for the agent to do some that-feeling-prompted action (Skorupski, 2010a, p.267). For example, according to the Bridge Principle, whatever fact that gives you reason to be thankful, also, and precisely because it gives you reason to feel thankful, gives you reason to do things that are 'prompted' by feeling thankful. The Principle of the Good, on the other hand, tries to capture the intuitive idea that something being 'good' is a reason to promote it. With both the Bridge and the Principle of the Good, Skorupski devotes a lot of time to explaining the epistemological status of those principles themselves (i.e. how they are justified). I don't think we have to go into that. Nor do I think it is necessary for us to get into the status of the practical reasons that these two principles generate. (For example, Skorupski considers whether the Bridge Principle can generate 'sufficient' reasons as opposed to, say, 'pro tanto' reasons—I don't think this is relevant to our concern.)

The most relevant principle to our project is the Demand Principle:

(Demand Principle) if it is morally permissible for x to demand that y α s, the fact that it is is a complete specific reason for y not to fail to α without x 's permission (2010a, p.352).

This is important to our purpose here because Skorupski defines rights as something that is very close to the first half of the Demand Principle:

x has a right to y against z if and only if it is *prima facie* morally permissible (relative to the facts) for x or x 's agent to demand that z does not take y from x , or does not prevent x from doing y , or delivers y to x (as appropriate), and to demand compensation for x from z in the event of damage resulting from z 's non-compliance (2010a, 311-2).

Thus, combining the Demand Principle and the definition of rights Skorupski supplies we are not only told what rights *are*, but we also get an account of what having a right *entails* normatively. This is quite a substantial position.

In one sense, then, Skorupski's account is perhaps the most deserving of the label 'demand theory of rights' among those Wenar has cited in his (2011), in the sense that Skorupski actually provides us with a concrete necessary and sufficient condition for when someone is said to have a right in terms of demands. But there are obvious differences between my account and Skorupski's.

The general point to note up front is that, unlike Skorupski, I am not offering a set of necessary and sufficient conditions for someone's being a right holder in my thesis, so a direct comparison is going to be tricky. It will no doubt be philosophically

interesting to attempt such a comparison, but it is not going to be straight forward. (This is related to my discussion of what I, in fact, see my contribution to the literature on theories of rights is; see Section 3-4, Chapter 4.) I hope the differences between Skorupski's view and mine that I am going to discuss in Sections 6-8 will explain why a comparison isn't straightforward.

7 Differences with Skorupski (1): Addressees of demand

The first point is similar to the point I already raised when commenting on Darwall's view: I want to draw attention to the issue of the 'addressee' of the demand. As I explained in Section 8, Chapter 2, I do not think that a rights-backed, authorized demand has to be made against someone *in particular*. The support for this claim is simply the way we normally understand the notion of demand: the examples that spring to mind when a demand is issued in a way that the addressees of a demand are under-specified are countless.

It is not clear whether Skorupski's account can accommodate that.⁴⁵ A lot depends on how much specificity Skorupski thinks *z* has to have in his definition of rights. For me, *z* can be under-specified or left vague. That is to say, a rights-backed, authorized demand can be made against no one in particular. If Skorupski agrees with me on this, that is fine, but unfortunately this conditional conclusion is all that I can offer on this point.

⁴⁵ The closest Skorupski comes to endorsing something close to my position on this point can be found in (2010b, p.364). There, he somewhat approvingly speaks of the permissible demands of 'sufferers' to assistance without specifying against whom those demands are supposed to be. However, it will be hasty to read that as a definitive endorsement of something close to my position.

8 Differences with Skorupski (2): The normative power of demands

I also want to highlight the difference between Skorupski's account and my own in terms of where the normative power of demands comes from. This, I think, is *the* most important difference, because this directly affects whether Skorupski's theory captures Feinberg's insight, which is what I see demand theories of rights, like mine, to be doing.

There is a sense that Skroupski's account is similar to Darwall's in the way that we have already discussed in Section 3: Skroupski seems to think that the normative power of the right comes *not* from that a rights-backed, authorized demand being *actually* made. Unlike Darwall, however, Skroupski thinks it comes from the fact *that one is permitted to make a demand*.

One strong piece of evidence for this claim is how the Demand Principle, which grounds his formulation of his account of rights, is construed. Skorupski writes: 'The Demand Principle says that if it is morally permissible for a person to demand that others act in a certain way *that very fact* is a sufficient reason for them to do so, unless they have the person's permission not to' (2012, p.138. Italics mine). I take what Skorupski means here to be that the *very fact*, as he says, that X is permitted to demand something is *itself* a (sufficient) reason for others to do what X could demand. This formulation prompts the question of what work demands actually do. To put the point differently, it seems, for him, it is the fact that one *is permitted to* demand that makes the normative difference, rather than the fact that one *demand*s.

To complement the above thought, Skorupski adds the following curious footnote explaining why it isn't the actual demanding, but the permissibility thereof, that does the normative work: '... where it is permissible for a person to demand

something, *refraining* from demanding is often what requires positive expression. Thus, in the case of your computer, you do not need to express the demand that I don't take it, but if you want to permit me to take it you must convey that permission' (2012, p.139).⁴⁶ I think this move is similar to Darwall's in extending the force of demand to cases where no actual demand has been made; Skorupski is effectively arguing that a demand will be *in force* even if none has been made, because for someone who can permissibly demand something, we should—*by default*—treat him as demanding that thing *unless the person states otherwise*. I reject this line of thought. As stated in my reply to Darwall (in Section 5, Chapter 2 and Section 3, Chapter 3), I think it is an illegitimate move to first rely on the intuitive appeal of the normative significance of actual demands and then conveniently expands instances of when a demand is in force. Being in a position to demand (e.g. being *prone to demand*—in Darwall's case—and *being permitted to demand*—in Skorupski's case) is no substitute for actual demanding.

And this is, again, not just a purely scholastic disagreement. This difference is pertinent to why I think Skorupski's account isn't really capturing Feinberg's insight. Skorupski's account of rights suggests that the 'permissible demand' actually does no normative work at all. So, in the story of the farmer we return to regularly, the very act of telling the campers to leave makes no normative difference according to Skorupski. That is because, as we have seen, the normativity comes from the *fact that* the farmer can permissibly demand them to leave, and the making of the demand, at best, does a mere epistemological-highlighting work (and, at worst, does nothing normative whatsoever). Thus, I find Skorupski's view does not come even

⁴⁶ Note that what is expressed in this footnote has not been explained in *The Domain of Reasons*. That is why I think it is important to look beyond his main work, i.e. (2010a).

close to capturing what the normative significance of *actual* demands is.

Here, one might be tempted to defend Skorupski by saying he could argue (in a way not dissimilar to my argument in Chapter 2) that his account of rights is perhaps a ‘partial account’, too. That will mean that although Skorupski indeed puts the normative force on *permissibility* to demand (and *not* on demands), he doesn’t, really, rule out that demands themselves could have some normative force.

This reply on behalf of Skorupski is tempting, but is untenable because Skorupski also holds that the Demand Principle, the Bridge Principle, and the Principle of the Good exhaust all sources of normativity in practical reasoning.⁴⁷ Given only the Demand Principle deals with (permissible) demands, and it is the Demand Principle’s very formulation that leads to this problem in the first place, I struggle to see how it is possible for Skorupski to take the ‘partial theory move’ and argue that there is still room in his account for actual demands having normative force. The exhaustiveness of the three principles of practical reasoning stifles that prospect.

9 Differences with Skorupski (3): Demands and permissibly of compulsion and enforcement

A final difference I want to highlight between my view and Skorupski’s is that

⁴⁷ Evidence of the exhaustiveness of these principles can be found in (2012, p.127): ‘I have a suggestion about what fundamental practical norms there are... [T]here are *just* three distinct kinds of practical norm governing what there is reason to do – three categories or generic sources of practical normativity, one may say. I call them the Bridge principle, the principle of Good, and the Demand principle...’ (Emphasis mine.)

Skorupski appears to have a stronger, and more loaded, view on what a demand is compared to mine in that he holds '[a] demand is something more than a mere request. Demand is conceptually linked to the permissibility of compulsion: a permissible demand is a request that it is morally permissible to enforce' (2010b, p.360).

The claim, I think, can be read in a number of ways. The strongest, and most literal, way is to read Skorupski as saying that whenever a demand has actually been made, the demand must be morally enforceable; *no demands can be made when the enforcement thereof is impermissible*. Thus construed, Skorupski's exposition of demands is plainly absurd—insofar as we are still operating within natural language usages. Just think about how the word 'demand' features in news stories involving kidnapping: we speak of governments refusing the *demands* of kidnappers, or that Somali pirates are *demanding* ransom for hostages held, or military juntas are listing *demands* to be met for negotiations of cease-fire. All these cannot be instances of demand under the current reading, because they have no connection to the moral permissibility of compulsion or enforcement.

But it seems implausible that Skorupski is unaware of this blatant point. Perhaps a weaker, and more charitable (though still, as we shall see, problematic) reading might be to regard him as making a conceptual point about how *from the agent's perspective*, to make a demand is to see that, *from the agent's point of view*, the demand is enforceable. This reading also seems consistent with another claim he makes elsewhere: 'to demand is to imply that enforcement would, if necessary, be permissible' (2010a, p.310)⁴⁸. The wording of this quote conveys, perhaps, a sense

⁴⁸ This claim first appeared in his (2010a), then was reprinted in (2012, pp.138-9) as well as (2010b, p.360).

that Skorupski is talking about things from the perspective of the agent making the demand—the purported connection between demands and compulsion, thus construed, is not about an ‘objective’ conception of demands, but about how things *appear* to the demander.

Yet even this weakened reading remains strange: the Somali pirates can hardly be thought of as implying, even from their own perspective, that their demand can be morally permissibly enforced. Furthermore, it is unclear why Skorupski would suddenly turn his attention to the demanders’ psychological story when they are making demands. His claim that these demands are requests that are ‘*morally* permissible’ to enforce has a highly non-subjectivist undertone—in fact, Skorupski cautions: ‘The point we should focus on is that rights give rise to morally permissible *demands*. In this context moral permissibility must be understood non-epistemically, as moral permissibility relative to the facts, i.e. under the assumption that the relevant facts are known’ (2010a, p.310. Emphasis original). This sharp focus on ‘facts’ makes it rather unlikely that Skorupski is talking about the ‘perceived facts’ from the perspective of the demander.

Ultimately, I think the most plausible reading is to see Skorupski as making a conceptual connection between the permissibility of compulsion or enforcement and *permissible demands*—*not* demands. This thought also has textual support: recall that Skorupski says ‘a permissible demand is a request that it is morally permissible to enforce’ as an *elaboration* of what he means by ‘demand is conceptually linked to the permissibility of compulsion’. Thus read, what Skorupski is asserting is actually that **if it is morally permissible for me to demand X, then the demand that X is (*in fact*) morally permissibly enforceable.**

The first point to note is that even this reading sounds at odds with what I take to be

natural usages⁴⁹; we are still left with the conclusion that Skorupski is making a departure from how we ordinarily use the word ‘demand’. It doesn’t seem natural, really, to claim that morally permissible demands are linked to morally permissible compulsion: I might be morally permitted to demand many things—including that my friend proofread this thesis for me, or that you give me a hand when my carrier bag is torn and my groceries start rolling around—but to say that these demands can be morally permissibly enforced sounds like a completely different (and stronger) claim that needs to be argued for separately. The bar for when it is morally permissible to make a demand seems to me significantly lower than the bar for when a demand can be morally permissibly enforced. Perhaps, as long as it does not harm or insult others to demand X, it is morally permissible to do so. But that bar is obviously too low for the moral permissibility of enforcement; to permissibly *enforce* a demand would most certainly require more than the demand being not harmful or insulting.

Put differently, under Skorupski’s understanding of demands, while I can permissibly demand my friend to proofread my thesis for me, I cannot demand^{*50} you to do so—because such a demand cannot be permissibly enforced: to do so will be ‘presumptuous’, as he sees it. (See further Section 10.1 where I invoke a similar

⁴⁹ Skorupski plainly has a different linguistic intuition here, as he writes: ‘But most of us would say that you are not permitted to demand, as against request, that I do. To claim a right where the other has at most a moral obligation is, precisely, presumptuous: presuming to something you do not have’ (2010a, p.310. Emphasis mine).

⁵⁰ Let us assume demand* denotes Skorupski’s conception of demand; I will limit this usage of ‘demand*’ to this subsection only.

argument in discussing the connection between ‘rights-backed, authorized demands’ and permissibility of compulsion.) We are ultimately left with the conclusion that Skorupski is indeed having a rather loaded view of demands which is quite different from natural usages.

Note, however, we do not have to accept that this use of demand* is a *mere* divergence of linguistic intuition on Skorupski’s part. Instead of saying it all boils down to intuitions, there is a more philosophically interesting way to explain the difference. One constructive way to make sense of what Skorupski is doing is to see him as departing from natural usages *in order to make demands do substantive philosophical work*. So what can be Skorupski’s rationale for doing so? The answer is that what he really wants is a conception of demand (i.e. demand*) that would allow him to say *the permissibility of which makes rights special*.⁵¹ That according to Skorupski what is special about rights is permissibility to demand is crystal-clear, for he plainly declares: ‘Moral permission to demand is what is special about rights’ (2010a, p.312). Given that, in order to make the moral permission to X what is *special* about rights, it does not seem surprising he then needs to ‘dress up’ X a little such that all the important work can indeed be done by X. Otherwise, if X remains something normatively uninteresting (like a natural understanding of what a demand is, as opposed to a demand*), permissibly to X can hardly account for what is special about rights. Given his overall commitment, it seems natural to make the conception of demand* as strongly as Skorupski does.⁵² But I fail to see why that

⁵¹ Permissibly is to be understood very straightforwardly: As Skorupski explains: “It is morally permissible to X’ means that it is not morally obligatory not to X.” See his (2010b, p.360, fn.4).

⁵² It should also be noted that Skorupski here broadly follows a (J. S.) Millian understanding of rights, who indeed ties it conceptually to compulsion or enforcement by society. This arguably explains why Skorupski needs a conception of demand* such that when it is permissible to make it, it is also

gives me reasons to follow him. My focus is not on demand*, and I think it is best if we work with a concept of demand that is free-standing, in that it does not find plausibility only against a certain theoretical backdrop.

10 Additional issues with Skorupski's view

Finally, before I conclude the discussion concerning the distinctions between my view and Skorupski's, I want to make two remarks. They are not, strictly speaking, 'distinctions' I want to highlight between my view and his, but I think I can better motivate my general refusal to be drawn too closely to his view by examining them.

10.1 Rights-backed, authorized demands and enforcement

To further our discussion in Section 9, I want to say something about *the relationship between rights-backed, authorized demands and permissibility of enforcement*. I submit that when we are talking about rights-backed, authorized demands, we should, too, be sceptical towards any suggestions that they are conceptually connected to permissibility of enforcement or compulsion as in the case of what Skorupski calls 'permissible demands'. I can indeed make a rights-backed, authorized demand that you show up for lunch as you have promised; that, according to the view I have been arguing for, standardly gives you a distinct reason to show up. Now whether enforcement is permissible seems to be, still, a different question. Maybe you really should show up—given you have promised me that you will, and I am demanding that you do to, *qua* a right holder. Perhaps, even,

permissible to *enforce* it. He does so in order to get the link between rights and enforcement via 'permissible demands*' and thereby preserving the Millian insight. I here keep the genealogical speculation on Skorupski's view brief. Skorupski discusses Mill on rights in (2010a, p.309).

given the reason I create in virtue of my demand, you *really* should, all-thing-considered, show up. But whether enforcement is appropriate in making you show up (or, more generally, in making you do anything you have good reasons to do anyway), I submit, is an entirely different matter. Enforcement, no matter how thinly the concept is read, implies coercion. To enforce something is to make a person do certain actions regardless of the will of the person by offering her coercive reasons for action, e.g. threats of unpleasant or harsh treatment. In my view, even when it comes to rights-backed, authorized demands, whether it is appropriate to coerce someone remains an entirely different discussion. To expect that permissibility of enforcement (and hence coercion) can simply be read out of a theory of rights is asking for far too much.

While this is not, strictly-speaking, a point of disagreement between my general view of rights and Skorupski's (since Skorupski does not talk about rights-backed, authorized demands but a different sort of demand as discussed in Section 9), I think this nonetheless allows me to make clear how fundamentally opposed I am to any suggestion that ties demands to enforcement—even when it is not just any common demand, but rights-backed, authorized demands.

10.2 The curious case of trivial rights

Finally, I want to draw attention to Skorupski's view that the very act of demanding is by itself a form of enforcement and what this entails (2010b, p.360).⁵³ As strange as this sounds, I am not going to dwell on this assertion. I want to focus on how this

⁵³ There Skorupski says: 'Even to say that you demand something is already to exercise a certain degree of exaction; demand is a form of command. To demand something is to imply that enforcement would, if necessary, be permissible....'

claim, together with something else Skorupski holds, results in a rather odd conclusion. On top of holding that demanding itself is a form of enforcement, Skorupski also holds that there are instances where a right is so trivial that enforcement—including even just the mere act of demanding—would be 'disproportionate'. The peculiar result is, as he himself plainly says: 'Just because demanding is already a form of enforcement, when a right is sufficiently trivial it may be disproportionate even to make demands' (2010, p.361). (Here I read 'disproportionate' as implying it is 'impermissible' to make demands.)

That leaves us with a somewhat strange conclusion. Under Skorupski's view, there is scope for **right holders whose rights are so trivial that they cannot, i.e. they are not permitted to, make demands about their rights.**

At first glance this doesn't sit comfortably with the overall view Skorupski has on rights. Previously I mentioned that Skorupski has given a definition of rights as follows:

x has a right to y against z if and only if it is *prima facie* morally permissible (relevant to the facts) for x or x's agent to demand that z does not take y from x, or does not prevent x from doing y, or delivers y to x (as appropriate), and to demand compensation for x from z in the event of damage resulting from z's non-compliance (2010a, 311-2).

My worry is: does this definition of rights sufficiently explain what is going on in cases of trivial rights? I think one can just about argue that it does, but it does so in a way that makes it impossible for us to account for these trivial rights. The reasoning behind my query is as follows: x's trivial rights, according to the definition stated, indeed give x a moral permissibility to demand a cluster of rights-related things

from z. But this permissibility is only *prima facie*: thus, in cases where these trivial rights are too 'weak' to justify x's morally permissible demands, presumably what happens is the *prima facie* permissibility to demand is *defeated*.

But if the '*prima facie*' provision does indeed make the permissibility of right holders to make demands about their rights defeasible, what is left in these cases where the *prima facie* permissibility is *indeed* defeated? This seems particularly worrying given Skorupski's repeated declaration on the centrality of the permissibility to demand to the idea of rights: 'Moral permission to demand is what is special about rights' (2010a, p.312), '... rights consist in the permissibility of demands...' (2012, p.138), and 'Permissible demand is what is special about rights' (2010b, p.362), just to name a few examples. **What then, given the centrality of the role of permissibility to demand in Skorupski's account of rights, are we left with to make sense of the right with a *defeated* permissibility to demand?**⁵⁴

A number of replies spring to mind; I will quickly run through them, but I claim none seems entirely satisfactory. One reply is that there is nothing Skorupski fails to

⁵⁴ Note that this reading is assuming that the definition of rights in (2010a) supercedes the formulation in his (2010b), where the 'prima facie' clause is missing. There, Skorupski writes:

X has a right to Y against Z if and only if it is morally permissible for X or X's agent to demand that Z does not take Y from Z, or does not prevent Z from doing Y, or delivers Y to X (as appropriate), and to demand compensation for X from Z in the event of damage resulting from Z's non-compliance (2010b, p.362).

It is difficult to imagine how it is possible for someone to hold a trivial right, which has a *defeated* permissibility to demand, when the 'prima facie' provision is missing. I will not speculate on that here.

answer for: perhaps there just *isn't* anything that a right holder is left with, normatively, when the permissibility to demand related to his trivial right is defeated by other considerations. Some might find this reply natural: in a case when one's permissibility to demand is 'defeated', perhaps it appears trivially true that nothing normatively significant is left, because the permissibility to demand has precisely been defeated. However, I am of the view that this leaves too much unaccounted for. Something must remain, normatively speaking, even if one's permissibility to demand certain things, as a right holder, has been 'defeated' by other considerations, and it is unclear to me whether Skorupski's view can accommodate that.

It might also be suggested that perhaps in cases where the permissibility to demand is indeed defeated, the trivial rights in question remain important in some counter-factual, residue-like way, in that *had things been different*, the permissible demands would not be 'defeated' and the rights would have had normative force.⁵⁵ I am sceptical of this answer too, because a counter-factual explanation of the residue normative power of such trivial rights amounts to a plain admission that, properly speaking, these rights, as things stand, have no normative power whatsoever.

In any case, whether any of these suggestions works is beyond the scope of our discussion here, since I do not take it to be my task to refine Skorupski's theory of rights. All I want to highlight is that it is not obvious whether there is a satisfactory explanation of the normative importance of trivial rights in Skorupski's theory, and that is a potential worry. This speaks in favour of my general tendency to stay away from Skorupski's account of rights.

⁵⁵ I owe this suggestion to Rowan Cruft.

11 Conclusion

In this Chapter, I have distanced myself from two accounts of rights that are generally taken to be notable examples of ‘demand theories’ of rights, namely Darwall’s and Skorupski’s views.

The main distinction between my view and Darwall’s rests on the fundamental difference in our overall goal: as I have argued in Section 3, Darwall’s view on rights is driven by his project to subsume all moral obligations under ‘second-personality’. This leads him to adopt seemingly puzzling (but understandable, in light of his grander plans) views concerning the concept of demand. (E.g. a demand is deemed to be ‘in force’ even in cases where no demands have, actually, been made.) But given I do not share with him this ultimate goal, I see no reason to accept any of his usages of the notion of demand that departs from ordinary usages. Whether Darwall’s overall project is correct and, subsequently, whether it gives us good reasons to side with him in the debate over rights is an issue I cannot deal with here. But I am content to have shown that, insofar as we are primarily interested in a theory of rights, my view is markedly different.

I have also distanced my view on rights from Skorupski’s. The differences are, in a sense, rather similar to the differences between my view and Darwall’s: they mostly have to do with how we conceive of the very notion of demands differently. The main difference between my view and Skorupski’s is that Skorupski seems to think demands are something quite loaded and are somewhat connected to enforcement or compulsion, while my view makes no such assumptions and has no such implications.

I hope I have presented a brief overview of the literature on the so-called demand

theory of rights, and have highlighted the fact that, despite the superficial similarity my view has with some other theories, my view is quite unique.

Part II

Rights, Demands, and the Will and Interest Theories of Rights

Chapter 4

The main aim of this chapter is to look at how my account of rights can contribute to the contemporary debate. The current literature, as has been the case for a while, is dominated by the will and interest theory debate (I shall refer to it as the ‘W/I Debate’ for short). I will hence begin by recapping that debate. There will be, however, a sizable detour taken on examining the shape of the debate itself, primarily because the debate is, I think, in a rather messy state which requires some philosophical housekeeping before we can proceed to examine the implications of my account. I will show, with much textual evidence, that it is often not clear what the theorists engaging in the debate are disagreeing over, and that there are at least two ways to read what the actual topic of disagreement is. These are what I shall call the ‘multi-incident reading’ and the ‘claim-right reading’, which, I argue, pick out different objects of disagreement in the contemporary debate on rights. The task of the first half of this chapter is to find a common ground from which my account can make some contribution. This exercise will constitute Sections 1-3.

In section 4, I proceed to outline what my addition to the debate looks like. My input, on the most basic level, is very straightforward: I think by committing oneself to Feinberg's insight, it becomes clear that one of the points of rights (or *functions*, in Wenar's way of framing things) is that they enable their holders to make rights-backed, authorized demands that have a normative force. My conclusion will be very modest. I do not claim to have a fully formed theory of rights to offer. However, by highlighting this function of rights, I shall argue that demands are neglected in the contemporary discussion—and it is a situation that should be reversed.

1 The interest and will theory

Let us begin with a brief introduction to the interest and will theory. This prepares

us for the upcoming analysis of the focal point of the debate between the two camps.

1.1 Interest theory

The interest theory, in the broadest terms, says that rights 'promote' interests in some sense: an entity (deliberately left abstract here, as there is no inherent consideration to the interest theory regarding how wide or narrow the scope of those who can be a right-bearer should be) is a right holder because having a right is in the interests of that entity. But this thought can be fleshed out in many different ways, as it indeed has been. Jeremy Bentham for example thinks that "rights are essentially 'benefits' and whoever benefited from a duty possessed a right" (Jones, 1994, p.27). Not being satisfied with how broad this definition is, most contemporary interest theorists do not hold this formulation as stated. Matthew Kramer identifies a common thesis that he thinks most interest theorists hold, which seems to be a weakened version of Bentham's view. He writes: 'Necessary but insufficient for the actual holding of a right by a person *X* is that the right, when actual, preserves one or more of *X*'s interests' (Kramer, 1998, p.62). Joseph Raz, on the other hand, stipulates that for *X* to have a right to something, both necessarily and sufficiently, *X*'s interests in having that thing must be sufficient to justify other people's having duties regarding the object of the right (Raz, 1986). It hence follows from this definition that there is a lot of room for interests that are not sufficient in justifying a right: my interests in being ridiculously rich most probably will not be the 'appropriate' kind of interests that justify some other people having duties regarding my being a billionaire, hence I can't have a right to that despite having an undeniable interests in being rich under the Razian formulation. One will also notice that the stipulated common thesis Kramer thinks is true of most interest theories is only a necessary condition (as opposed to the Razian formulation). Indeed, one might see the on-going quest in the interest theory literature as an attempt to formulate the missing sufficient condition.

Now in the contemporary debate, Raz and Kramer are the two interest theorists that have attracted the most attention. Therefore, before we go on, it is worth noting that Raz's and Kramer's interest theories are, if one scratches below the surface, driven by quite different concerns. (It is, I think, a major achievement in the recent literature on the interest theory that it is becoming increasingly clear that Raz and Kramer are in some sense talking past each other. The fact that in his recent publications Kramer sets out to distance his own position from Raz's at the outset, before even giving his own version of the interest theory, testifies to this point.⁵⁶) Kramer sees himself as mainly being concerned with developing an interest theory of *legal* rights, and focuses on something very specific, i.e. the 'directionality' of duty:

Specifically, what the Interest Theory does is to articulate the basis for the directionality of any legal duty. In other words, *it recounts the general considerations that determine to whom any legal duty is owed*. If someone is the person to whom a legal duty is owed, he is the person who holds the legal right that is correlative to that duty. Hence, at a level of high generality, the Interest Theory enables us to identify the holders of any legal rights. If we know the content of a legal duty, and if we know the sundry evaluative and nonnormative facts that pertain to the fulfillment of that duty, we can employ the Interest Theory to ascertain who holds the correlative legal right (2013, pp.245-6. Italics mine).

Simply put then, the version of interest theory that Kramer thinks is at the heart of the W/I Debate has the purpose of giving the following answer:

Question: Who has the right against Y that Y ϕ s?

⁵⁶ See, e.g., Kramer (2010) and (2013).

Scenario: We know Y is under a legal duty to ϕ . We also know that X, and only X, benefits from Y's ϕ -ing.

Answer: The interest theory (Kramer's version) says the right holder cannot be someone other than X—because benefiting from Y's duty is a *necessary but not sufficient condition* for being a holder of the right to ϕ against Y.

Before wrapping up this brief summary of the interest theory, I think it is worth exploring one potential problem I already highlighted, although I can't afford the luxury of even nearing a solution to it. It is not clear to me whether Raz's definition of rights in terms of interests is trying to capture anything remotely like Kramer's. Raz himself says of his definition of rights:

The proposed definition of rights identified the interest on which the right is based as the reason for holding that some persons have certain duties. Later on I referred to the rights themselves as being the grounds for those duties. The explanation is simple. The interests are part of the justification of the rights which are part of the justification of the duties (Raz, 1986, pp.180-1).

This makes it very doubtful whether Kramer's, as it were, '*give me the duties and I will give you the claim right*' approach is a good way to understand Raz's theory. The reason is that it is not clear, given Raz's commitment regarding the nature of the relationship between rights and duties, whether there is room within Raz's view on rights for all duties to be laid out—*prior to the rights being established*—in order for us to go over them, looking for the whereabouts of rights. The commitment to which I refer is best spelt out by Raz himself in the following remark: '... one may know of the existence of a right and of the reasons for it without knowing who is bound by duties based on it or what precisely are these duties' (1986, p.184). This reveals one crucial point: according to Raz, it is completely plausible for us to establish what the right is, who holds the right, and the justification for thinking so, *prior to any*

duty-talk. (Incidentally, Raz is not the only interest theorist who holds this view. See, e.g., MacCormick (1982, pp.161-3).) This makes me wonder whether we can read Raz in a way that is similar to Kramer's account. It is simply not true, for Raz—and MacCormick—that you can (always) first establish what duties there are, and who benefits from those duties being performed, *and then* establish who has a right *in that order*. The story, at least sometimes, actually goes the other way round, from rights to duties. I am therefore sceptical of the grouping together of Kramer and Raz as if they are defending something similar—they are, I hope I have shown, not. I do not pretend to have a proposal to reconcile the differences; I will have to leave that attempt for another time.

1.2 Will theory

The will theory, on the other hand, broadly holds that rights are about the right holder's choices (hence 'will'). That is, according to the will theory, the right holder comes to have certain choices regarding the content of the right as a right holder. These choices include waiving or enforcing duties. For example, according to the will theory, having a right is to be in the position to, among other things, choose to waive the duties others have towards you. The paradigmatic example will be a right that grows out of a promisee. We would intuitively think that if the promisee is said to have a right that the promiser upholds the promise, a core part of that right must be that the promisee can waive the duty of performance of the promiser.

Again, it is helpful to see what conditions a will theorist commits to for someone's holding a right. A will theorist standardly thinks that to have a right *is* just to have some control over the duty owed to her (which amounts to the assertion that 'X has a right iff X has control over certain duties owed to her'). Control here is to be understood technically, and one might see how different substantive will theories differ depends partly on how to fill in the idea of control. See, e.g., (Steiner, 1994).

It might be helpful to contrast the difference between the will and interest theory by thinking about a similar scenario to the one that appeared in Section 1.1. The aim of the will theory is to give the following answer:

Question: Who has the right against Y that Y ϕ s?

Scenario: We know Y is under a duty to ϕ . We also know that X has control over Y's ϕ -ing.

Answer: The will theory says the right holder here is X, *given X has control over Y's ϕ -ing.*

1.3 The usual controversies in the W/I Debate

The debate between these theories typically involves each side attempting to show that their preferred theory better explains more instances of rights than their opponents' theory.⁵⁷

For example, interest theorists like to stress their ability to accommodate 'inalienable rights'. They claim that the will theory doesn't have the resources to explain what is going on when we say X has an inalienable right not to be enslaved. That is because inalienable rights are, in a way that is conceptually problematic for the will theorists, defined exactly as rights that you cannot waive (MacCormic, 1977). The will theorists would standardly dismiss this as a non-problem in the first place, because, plainly, if these inalienable so-called 'rights' do not come with the control

⁵⁷ This summary is very brief. To get a fuller picture of what the current state of the debate is, Wenar's (2008) is a good place to start. It also has the merit of being very meticulous in trying to categorise into three strategies the responses of both the will and interest theorists to their opponents, namely: 'Narrowing the range of phenomena to be explained', 'Expanding the scope of the theory', and 'Redefining the phenomena to be explained'.

on the purported right holder's part, they simply cannot be rights (Steiner, 2013).

The will theorists also seem to face the trouble of ascribing rights to agents who cannot possess the ability required for any type of control. For example, an infant cannot be a right holder according to the will theory, for the obvious reason that if it is necessary to have some control over duties in order to qualify as a right holder, infants are simply excluded by definition (Kramer, 1998, especially pp.69-70). The common rebuttal here is for the will theorists to reply that they are dealing with a 'technical' notion of rights, and it is perfectly plausible to say an infant, himself or herself, actually has no legal rights—but his parents, e.g., might; one can tell a story about how these people, who have control over the duties, are the proper right holders, and the rights we normally conceive of as the rights of an infant are merely rights regarding, and not held by, the child (Steiner, 1998, especially p.261).

The interest theory, on the other hand, faces what is known in the literature as the 'third-party beneficiaries' problem. The charge against them is that there is no way (or no principled way at least) of stopping some, as it were, 'accidental' beneficiaries of a contract becoming a right holder to the fulfillment of the contract. The challenge to the interest theory here is that, assuming there is a legitimate and binding contract that Alex and Brian go into, Alex agrees to pay Brian something and in return Brian will deliver a parcel to Calvin. The will theorists want to say here that, clearly, Calvin is not a right holder regarding Brian's delivery of the parcel—and the will theory can accommodate that perfectly well.⁵⁸ Furthermore, they press on:

⁵⁸ Whether that the will theory rules out third party beneficiaries as being right holders is an advantage is growing increasingly unclear; the legal principle behind it has been somewhat changing, as reflected in the Contracts (Rights of Third Parties) Act 1999 of the United Kingdom Parliament. More and more common law jurisdictions have started questioning and weakening the Principle of Privity, which (partly) holds that only contracting parties can have a right concerning the enforcement of the contract. See the consultation paper published by the Law Reform Commission of Hong Kong (2004) on proposed legislation regarding the Principle of Privity for a neat summary of the trend.

what resources within the interest theory are there to stop that? None, the will theorists argue—and claim therefore that the interest theory is in trouble. The debate progresses from here in a somewhat confusing way: interest theorists might say, of course, Calvin is not a right holder; for even though it is true that the interest theory does not rule out Calvin's being a right holder, it does not entail it either. This allows the interest theorists to commit themselves to some other principle in determining why Calvin isn't a right holder—and to explain why Calvin, despite being a beneficiary, does not in virtue of that become a right holder to Brian's of the parcel. I am not going to go into the details here.⁵⁹

Section 1, I hope, has given a brief overview of the W/I Debate. This, I suspect, captures how most people see the W/I Debate—but I shall argue that this is somewhat an over-simplification.

2 Remarks on the W/I Debate

2.1 Remark 1: What is the W/I Debate *actually* about?

In this section, I want to press a point that is strangely seldom made explicitly in the literature: there seems to be at least *two* ways to read what the W/I Debate is actually about. I have been, in a hand-waving kind of way, describing the W/I Debate as a debate over 'what a right is'. But strictly speaking, this is only partially correct.

I am going to label the first way of reading the debate the '*claim-right reading*' and

This change in a sense echoes David Lyon's contention decades ago: perhaps the interest theory actually has the upper hand in this debate precisely because it allows—and accounts for—third party beneficiary rights. See (Lyons, 1994), especially Section III, Ch.1.

⁵⁹ Kramer's complex take on this, adopting some test of 'minimal sufficiency' from Bentham to determine who the right holder can be, can be found in his (2010).

the second way the '*multi-incident reading*', for reasons that will become obvious below. Both ways rely heavily on the Hohfeldian framework; yet the ways they do so are significantly different. I think it is important to get this difference clear before we move on to the contribution my account can make to the contemporary debate on rights. I do not see myself as making any groundbreaking observations, but I do think there is a severe lack of attention paid to this distinction.⁶⁰

2.1.1 *The claim-right reading*

I propose that according to the *claim-right reading*, the W/I Debate is about *what a claim-right is*, with 'claim-right' here being understood as the Hohfeldian claim. In other words, this interpretation of the W/I Debate holds that theorists in the literature are divided over when someone has a Hohfeldian claim-right: some think that is determined by where the 'interests' are, some 'will'.

Not surprisingly, theorists who adopt this reading of the debate also hold that, following Hohfeld, claim-rights are 'rights consisting of duties owed to us by others' (Cruft, 2013, p.195). Therefore a lot of the time the W/I debate (under this reading) is also characterised as a debate over *what it takes for a duty to be owed to someone, and to whom it is owed*. Most recently, Cruft (2013) is the clearest example of someone who reads the debate in this way. Cruft begins his summary of the different positions in the W/I Debate as follows: 'Suppose I am subject to a particular duty... Is it owed to anyone? If so, whom?' (2013, p.196) For Cruft, then,

⁶⁰ A notable exception is Cruft (2011).

Note that I have adopted some of the key interpretative elements from the *claim-right reading* in the introduction of the W/I Debate in Section 1. I have chosen this over the *multi-incident reading* purely because of its prominence in the most recent discussion of the will and interest theory. That choice shouldn't be read as my endorsement of one over another.

the W/I Debate just is a debate about the *directedness* of duty—and hence, in his and a lot of people’s view, a debate over who holds a Hohfeldian claim.

Cruft goes on to summarise the different versions of will and interest theory as follows:

Hart’s and Steiner’s Will Theory: Duty DD is owed to anyone who has powers to waive or enforce it.

Raz’s Interest Theory: Duty DD is owed to anyone whose interest is sufficient to justify it.

Kramer’s Interest Theory: Duty DD is owed to anyone whose situation would, by DD’s fulfillment, necessarily be affected in a way that is typically beneficial for a being of the relevant type (human, animal, group). (Cruft, 2013, pp.196-7)⁶¹

From these formulations there can be no doubt Cruft sees the interest and will theory as different attempts to answer the question ‘who is being owed a duty?’—which is, Hohfeldians think, logically equivalent to the question ‘who has a claim-right?’

There is evidence to suggest Steiner too reads the debate similarly. Steiner says: ‘The Will Theory and the Interest Theory offer opposing accounts of how that direction [of the conduct conforming to directed duties] is determined—how the specific persons to whom that conduct is owed are to be identified....’ (2013, p.232). Thus he too seems to think that the W/I Debate is about ‘determining’ the

⁶¹ I have already mentioned earlier in this chapter my reservations regarding the reading of Raz’s interest theory in this way. I will not revisit those worries at present. Cf. Section 1.1.

directionality of duties. Wenar in his most recent work reads the debate this way, too. In 'The Nature of Claim-Rights' (2013), he seems to think his own theory of *claim-rights* (i.e. what he calls the 'kind-desire theory') fares better than the will and the interest theory, thereby implicitly suggesting that the W/I Debate is, too, about claim-rights.⁶² Gopal Sreenivasan, in developing his 'hybrid theory of claim-rights', also sees the W/I debate in this way—it is evident in his approach, which is to combine a will theory of claim-rights and an interest theory of claim-rights to construct a hybrid theory of claim-rights (2005, p.257).

Let me summarily conclude what is, under the *claim-right reading*, the point of the W/I Debate by sharpening the point of agreement and disagreement respectively. Under the claim-right reading, the will and interest theorists all follow Hohfeld closely in holding that *A has a claim-right against B to φ if and only if B has a duty to φ owed to A*. This point of agreement is what Steiner calls the 'existence issue'. As Steiner explains: '... what is not at issue between [the will and interest theorists] is that a *Hohfeldian* claim-duty relation cannot exist in logical isolation. It must imply the existence of other *Hohfeldian* relations... if it is to count as constituting a right' (1998, p.245). So the will and interests theorists, under the claim-right reading, agree on the logical interdependency between claims and duties—as all card-carrying Hohfeldians do.

The real disagreement between the will and interest theorists, on the other hand, is given B has a duty to φ , *who A is*. Again, to quote Steiner, he thinks the disagreement in the W/I Debate is on 'how the specific persons to whom that conduct [conforming to directed duties] is owed are to be identified' (2013, p.232). So the real question being asked, under the claim-right reading, becomes 'what determines the identity

⁶² Note that this is a departure from the language Wenar uses in his (2005) and (2008) . More on this in Section 3.

of A?'. On the *claim-right reading*, the will theory holds that A is he who has the power to waive or enforce that B ϕ s, given B has a duty to ϕ . Whereas on the same reading of the W/I Debate, the interest theory (according to Kramer's version) holds that A cannot be anyone other than those who benefit from B's ϕ -ing, given B has a duty to ϕ . (Or, under Cruft's rendition of Kramer's account, the interest theory holds that, assuming B has a duty to ϕ , A is he who is necessarily influenced in a way that, given the sort of type A belongs to, A typically benefits from B's ϕ -ing (Cruft, 2013)⁶³.) The point worth reiterating here is that the disagreement on the 'directionality' indeed does not upset the theorists' agreement on what Steiner calls the 'existence issue' in anyway.⁶⁴

2.1.2 The multi-incident reading

On the other hand, according to the *multi-incident reading* of the W/I Debate, the issue is to determine, of all those Hohfeldian incidents, what—or what combination thereof—counts as 'rights'. That is, under the multi-incident reading, the will and interest theorists are attempting to explain in their own different ways what marks out certain Hohfeldian incidents as constitutive of 'rights'.

⁶³ Cruft's formulation has some connection to Kramer's own discussion (and refinement) of 'Bentham's Test' in ruling out silly cases of rights ascriptions to almost accidental interests-holders. I will steer away from this debate.

⁶⁴ It is of interest to note here there is a slight complication over whether Raz is in agreement with everyone else on the 'existence issue'. While he is not, properly speaking, a Hohfeldian in the strict sense, it is undeniable that Raz thinks there is a close connection between rights and duties, such that a right holder is always owed some directed duties. The differences come in when we start thinking about what those duties are: in Raz's view, these duties do not have to be a 'one-to-one' correlation. See his discussion on what has become known as the 'dynamic aspect of rights' in the literature (Raz, 1986, p.184).

Cruft, this time in his earlier work (2006), sees the debate just that way. Cruft describes himself as following the 'capacious approach'—i.e. the view that 'right' is a label that applies to some combinations of Hohfeldian incidents, and that the theory he defends is a version of the interest theory under the 'capacious approach' (2006, p.178). What the will theory and the interest theory disagree over, according to this view, is that they tell difference stories underpinning which (combinations of) Hohfeldian incident(s) count as rights and which do not. Crudely put, under the *multi-incident reading*, the interest theory will say that in order to count as a right the combination(s) of Hohfeldian incidents must serve the holder's interest; the will theory, on the other hand, will say that the combination(s) must protect the right holder's choices or control over some duties.

Incidentally, the seemingly strange question 'Why aren't duties rights?' in Cruft's article (2006) only makes sense if we assume 'the capacious approach' to be true: that is, we must work under the assumption that 'right' is a label that applies to different combinations of Hohfeldian incidents. It is only then that it becomes intelligible to ask why a duty is never included in one of those combinations of Hohfeldian incidents that constitute a right. Otherwise, it is very strange indeed to start thinking about why duties aren't rights. For example, if one thinks a Hohfeldian claim is the only possible candidate for a right (Kramer thinks along this line), it is quite hard to get a grip on what the question 'why aren't duties rights?' is supposed to be about. This strengthens my reading that Cruft's 'Why aren't duties rights?' is an instance of interpreting the debate over rights under the *multi-incident reading*.

Wenar, too, again in his earlier works, holds this view. In both his (2005) and (2008), Wenar frames the W/I Debate plainly as one over how the label of rights is applied: and, importantly, what sort of Hohfeldian incidents the label of rights ought to cover. He asks plainly: 'All rights are Hohfeldian incidents. Are all Hohfeldian incidents rights?' (2005, p.237) before stating the W/I Debate is about what the correct

answer to this question is. (This appears to contradict what Wenar himself says as quoted in 2.1.1—more on this in Section 3.)

Let me recap my exposition of the *multi-incident reading*. Theorists in the W/I Debate who adopt the *multi-incident reading* see the will and interest theory as different ways of explaining why certain combinations of Hohfeldian incidents are rights while others aren't. So, crudely put, under the *multi-incident reading*, the will theorists maintain that only those Hohfeldian incidents which yield *control* are rights; the interest theorists would say, on the other hand, only those incidents that yield *interests* are rights.

2.1.3 Remarks on the two readings

Note that I do not intend to present the two readings of the W/I Debate as mutually exclusive or as being in conflict. It is not my intention to argue that theorists *must* choose one way or another to present their version of the will or interest theory. In fact they often assume—a bit hastily perhaps—that they are addressing both concerns in one stroke.

For example, Kramer would consider himself, I think, to have addressed the questions raised under both readings. If one goes with the *claim-right reading*, Kramer would think that his interest theory gives a clear answer to the question being asked: 'interests' provide the answer to the question of who the claim-right holder is. On the other hand, Kramer would also think that his interest theory gives an answer to the question being raised under the *multi-incident reading*, too: he thinks that only claims are rights, which he thinks is what Hohfeld (strictly speaking) intended.⁶⁵

⁶⁵ For Kramer says plainly: 'Interest Theorists join Hohfeld in regarding "right" and "claim" as interchangeable designations... a Hohfeldian claim qualifies as a legal right even if it is not accompanied

It is in fact interesting to ask why Kramer thinks only claims are rights: it doesn't seem likely that focusing on claims is the most plausible option for an interest theorist to adopt under the *multi-incident reading*. For example, why doesn't a liberty count as a right if it benefits the right holder according to the multi-incident reading? Indeed, Cruft's article, 'Rights: Beyond interest theory and will theory?' (2004), is written exactly in this spirit. As Cruft proposes there, sometimes even having Hohfeldian *liabilities* benefits oneself—for example, if I have a liability to receive gifts worth millions of pounds, surely, Cruft argues, that will be in my interest (Cruft, 2004, p.179). And if so, why cannot liabilities be rights according to an interest theorist? Whether or not Cruft's contention here is correct, it does demonstrate what an interest theory could, or even should, look like under the *multi-incident reading*: rights are *those Hohfeldian incidents that benefit whoever is the holder of those incidents*. One might reasonably wonder, if one were an interest theorist, why one should follow Kramer. Kramer's reply here, presumably, would be that Hohfeld didn't label anything else other than claims as rights⁶⁶—an answer that I find highly suspicious. But I will not pursue this question any further, as it is not my task to perfect the interest theory myself.

To return to the point being made in this subsection, my admission that the two readings of the W/I Debate are not in conflict does not mean that the distinction between the two readings is pointless or illusory. It remains true that the two readings are distinct. It is indeed one thing to say that one's version of the will or

by any other legal entitlements in the hands of the claim-holder (though it will be a hollow right if it is not accompanied by immunities that protect it from being extinguished) (2010, p.33)'.

⁶⁶ Kramer's rejection of any empirical way of refuting Hohfeld's stipulation seems to suggest that his insistence that only claims are rights is down to his commitment to Hohfeld's own stipulated definitions. For example, he agrees that the word 'rights' can be used by judges in a non-Hohfeldian way—but, and I quote, 'So what?' (1998, p.24).

interest theory can address both questions raised under these readings respectively, but it is quite another to say that, therefore, the difference is merely illusory. The difficulties involved in putting one's finger on what, exactly, the disagreement is between the will and interest theory make it more difficult for me to make any straightforward contribution to the W/I Debate: should I say something about moving the W/I Debate forward while adopting the *claim-right reading*, or the *multi-incident reading*, or even both? This is the question I return to in Section 3.

2.2 Remark 2: A debate about legal rights (only)?

The more prominent figures in the debate (particularly Kramer and Steiner), despite some differences, are, generally speaking, all in agreement that the will and interest theory are predominantly theories of *legal* rights. That is however not my particular focus. Does this mean that my account will have little or no implication to the W/I Debate? My response is twofold.

First, although legal rights are not the focus of my account, saying that the W/I Debate focuses on legal rights (as opposed to moral rights) poses no challenge to my argument. Unless one thinks, in my view implausibly, that our understanding of legal rights is detached from, and irrelevant to, our more general understanding of rights, my account would naturally have something to say about the W/I Debate and the contemporary literature on rights. I am not alone in this approach. Consider, for example, Cruft's explanation of his methodology, which I take to be similar in spirit to what I am trying to do:

My aims are to seek an analysis of the concept 'a right' that accords with the multifarious ways in which this term is used in everyday ethical and political debates, and to argue that philosophers and legal theorists would benefit from adopting such a non-revisionary approach' (2004, p.348).

Thus if one starts by approaching rights in an ordinary sense and assumes that legal rights are, too, 'rights', then it just follows that one's view on rights will have implications on debates over legal rights.

In addition, theorists do sometimes seem to think that the W/I Debate is actually more than just about legal rights. In a remark on the strategy of limiting what one's theory is about and, thereby, ruling out counterexamples, Wenar says:

As with scientific theories, a more comprehensive account of the subject matter is always preferable to a less comprehensive account. It is particularly clear with rights. A theory that is adequate only to rights within one part of the law will at best satisfy certain specialists, and will not provide an analysis that is useful for understanding rights as a central concept in morality, in politics, and in the law viewed more broadly (2008, p.256).

I take it from the quotation that Wenar thinks the latter sort of theory is superior to the former. It is thus safe to conclude that both Wenar and Cruft think that a mark of a good theory of rights is that it is about a concept that is wider than merely legal rights. It is in this spirit that I continue this chapter.

3 Housekeeping the W/I Debate: Laying the groundworks for my contribution

So, to return to the original question with which we began Chapter 4: how can my account make a contribution to the W/I Debate?

This question, it should be clear by now, is not an easy and straightforward one to answer if we pose it in its current form. The reason is that there are, as discussed, different ways of actually construing what the W/I Debate is about. I think we need to change the focus of what we are asking slightly in order to proceed. The rather

confusing state of the W/I Debate, which we looked at from Section 1 to 2, should not lead us to conclude that my account cannot make any contribution to the debate at all, simply because it is hard to pinpoint exactly what the disagreement is about (temptingly simple and straightforward though this conclusion may be). Rather, a more meaningful way to proceed is to see myself as speaking to a point which requires us to take one step backward from the W/I Debate. Instead of trying to work out what the theorists involved in the W/I Debate are disagreeing over when they use such labels as 'will theory' and 'interest theory', we should reflect upon what might be a more fundamental way to characterise the debate that, in a way, 'transcends' the different readings of the point of the dispute. This makes it possible for my account to interact with the W/I Debate in a more meaningful, and less dismissive, way.

Therefore what I am proposing to do in Section 3 is to, in some sense, 'unify' the two readings of the W/I Debate—in other words, more philosophical housekeeping. I want to dig deeper and find some way to explain the disagreement between the two camps on a more basic level, which will cut through the two readings we inherit from Section 2. I propose that it can be done with the help of the notion of 'function'—this will allow me to conclude that the fundamental disagreement between the will theory and the interest theory, under whatever reading, is one over the 'function of rights', and it is on this that my view of rights has some interesting contribution to make.

3.1 The function of rights: An exposition

So, despite the different ways of construing what the will theorists and interest theorists disagree over, what *is* the very point of their debate on a deeper level? There must be, I think, some way of trying to understand the disagreement, under whatever reading of the debate one picks, that underpins these different readings. The cue, I think, can be found in Wenar's writing. To go back to the passage I have

quoted before where the very label of 'demand theory' comes from, Wenar writes:

Will theorists and interest theorists have developed their positions with increasing technical sophistication... The seemingly interminable debate between these two major theories has encouraged the development of alternative positions on *the function of rights*.

"Demand" theories fill out the idea that, as Feinberg puts it, "A right is something a man can stand on, something that can be demanded or insisted upon without embarrassment or shame (1973, p.58-9)." For Darwall (2006, p.18), to have a claim-right, "includes a second-personal authority to resist, complain, remonstrate, and perhaps use coercive measures of other kinds, including, perhaps, to gain compensation if the right is violated." On Skorupski's account (2010a, Ch.14&16) rights specify what the right-holder may demand of others, where "demand" implies the permissibility of compelling performance or exacting compensation for non-performance. Like the will theory, such accounts center on the agency of the right-holder. They do not turn on the right-holder's power over the duty of another, so they do not share the will theory's difficulty with unwaivable rights. They may, however, have more difficulty explaining power-rights. Demand theories also share the will-theory's challenges in explaining the rights of incompetents, and in explaining privilege-rights (2011. *Italics mine*).

Notwithstanding the difficulty of putting Feinberg, Darwall and Skorupski together in one basket, it seems one possible way to read Wenar is that he thinks the will, interest and demand theories of rights are all speaking to the same point, so much so that he assumes the demand theory to be a 'new contender', as it were, in the W/I Debate. But how? Wenar (in various publications but most pointedly so in the encyclopedia entry currently under discussion (2011)) sees all these theories as

attempts to spell out a particular view about what he calls the *function of rights*. Thus, disagreeing over what the *function of rights* is is the simplest way of spelling out what the W/I Debate is about: the will theorists think they have a will-related function, while the interest theorists think they have an interest-related function. But what can these 'functions of rights' be? Is the suggestion that rights have functions even intelligible? This somewhat obscure proposal is worth some investigation.

Now Wenar himself doesn't explain in any detailed way what he means by rights having functions, but I think it is reasonable to assume that he doesn't at all intend to use it as a technical concept with some peculiar, tailor-made definition. I suggest we should consider how 'function' is ordinarily used to help us unpack the thought that rights might have functions. I am going to bypass the huge literature on function in the philosophy of science. I don't think it is helpful to get deep into the intricate accounts of functions—I don't think it is necessary for my purpose, especially given Wenar himself never invoked anything from that literature.

Ordinarily, when we say X has a certain function, we might mean that X is *for* some purpose, or that there is something that X *does*. That, on first glance, seems simple and intuitive enough. X may be a toaster, a blender, or a hammer, and these things will be *for*, or they *do the work of*, toasting, blending, and hammering, respectively. To say that toasters have function(s) is just to say that there is something—toasting in this case—that the toaster is *for*, or that the toaster *does*. This appears to be how Wenar thinks of rights as having functions, for he says matter-of-factly: 'The question of the function of rights concerns what rights do for those who hold them' (2008, p.253).

But things start getting a little complicated when we begin to reflect on the distinction between 'function' and 'use', to the extent that the principle that 'the

function of X is simply what X does', becomes untenable. There are a lot of things that a toaster, in reality, *does*; yet they can hardly be thought of as the function of a toaster. (To take a rather amusing example, the London Fire Brigade recently launched a campaign highlighting the importance of 'common-sense', with an article entitled sensationally, 'Do not try to get your penis stuck in the toaster' (Brown, 2013). There, we have a concrete example of toasters being used in a way which, however popular this usage becomes, we wouldn't dream of associating with the toaster's *function*.) More generally speaking, usage, however widespread, seems to fall short of constituting function by itself. It is not the case that whatever X is, or can be, used for, these ways are then also necessarily considered to be X's functions. Just because screwdrivers can be (and probably have been) used to stab someone in the eye as a murder weapon, it seems wrong to thereby declare 'stabbing someone in the eye as a murder weapon' as being part of what we think of as the function of a screwdriver—even, we might further stipulate, if there comes a day when screwdrivers become popular murder weapons. There is still a sense that stabbing people in the eye is just *not* the function of a screwdriver. And, to borrow an example from philosophy of biology, just because spectacles rest themselves on noses does not compel us to think that it is the *function* of noses that they support spectacles, however widespread the phenomena.

So we need a way to make sense of what Wenar is trying to pick out with the idea of function such that function is made distinct from mere use. I think the way to advance here is to understand 'function', as used by Wenar, in a similar way to what Nickel (forthcoming) calls the 'prescriptive' way of understanding functional claims. (Nickel's own focus is on the function and *role* of human rights.) That is, by saying that a right has a function, F, we do not simply mean that this right, statistically predominantly, *does* F, or that F is how the right is predominately used. By function, we mean something deeper—something that is not straightforwardly rejectable by empirical findings, for saying that 'X has F' is in some sense prescriptive (as opposed

to descriptive). Very crudely put, to say that X has F is to say that F is something that X is *meant to* do, that X is *for* the purpose of F-ing. The 'meant to' locution is trying capture the prescriptive flavour of functional claims. (It is thus in some way a 'teleological' account of functions—there is a 'purpose' to rights. This might cause scepticism, but I am going to ignore the controversy in adopting a teleological view of functions, in both the biological cases and cases involving artifacts. For a summary of what contemporary views on such issues are, see Perlman, (2004). I am not going to defend its plausibility here.)⁶⁷

⁶⁷ Let me say a bit more about how it is possible that the function of X and the use of X can, and in fact should, come apart via thinking about what it means to say that we can understand the notion of function in the prescriptive sense. I take it that it is not controversial to think that things might be used to do one thing and are, actually, meant to do something else. We have already been through many examples. One worry about this line of thinking goes as follows: but ultimately, can there be anything beyond and above 'use'? Even if we take the example of the screw driver above: if there comes a day when the only use of a screw driver is to kill, and that, for instance, screws have fallen out of fashion, and there is no possibility for screw drivers to be used as they were designed for, then wouldn't we in this case think that the function and use of screw drivers ultimately have to collapse into one another?

However, I think we still ought to resist this conclusion. That is because, as I have been saying, this way of understanding the relationship between use and function fails to respect the prescriptiveness of function. The prescriptiveness of function can be fleshed out by thinking about how there is a sense that functional claims shouldn't be accidental. When we see functional claims as collapsable into claims about usage, we lose the sense that the function of an object is something about what the object is meant for. It becomes something entirely contingent upon circumstances and happenstances: because how things, including concepts, are used is a contingent matter.

Therefore, I think a plausible way to resist the conclusion is to maintain that by function, we are having in mind something that is prescriptive. Of course, the source of this prescriptiveness can vary, and it can come in many forms. One can for example hold a view that equates this descriptiveness with some kind of 'intention': we can say that the function of X is whatever the creator of X intends for it to be. This is problematic in some cases, e.g. when things don't (obviously) have a creator. Alternatively, one can hold the prescriptiveness to be in a sense teleological: when philosophers with Aristotelian tendencies

With this in mind, perhaps we can better interpret Wenar's assertion that the function of rights is what they do for those who hold them. It should now be refined as follows: to say that rights have functions is to say that *there are things that rights are meant to do for those who hold them*—and the will, interest and demand theory disagree over what those things, which rights are meant to do, actually are. This refines Wenar's use of function by explicitly injecting into it a bit of prescriptiveness.⁶⁸

speak of the function of the human being, I take it they are not necessarily thinking about the 'purpose' that human beings are made to fulfill by some intentional creator, nor are they thinking about how predominantly human beings are used. Instead, I think they are appealing to some sense of how the human life is *meant to be*--and I am inclined to think this is the most natural way of understanding functional claim in many cases. Of course there remains the worry that perhaps the only plausible way to understand this Aristotelian sense of function might, ultimately, have to be justified further. Does it, really, have any plausibility at all? Can we make sense of the 'meant to be' locution in a completely 'usage-free' way? I concede that this is not something I can defend here. I can merely afford to flag up the worry and hope to the settle the matter elsewhere.

I hope I have explained why I think it is important that the distinction between use and function is one that we mustn't let go, and how I think by maintaining that functional claims have a sense of prescriptiveness helps us see more clearly that distinction. I have not, it is true, given a full account explaining how any prescriptiveness can come about (especially in cases where a creator of the thing or being in question is not available to be wheeled out as the source) but I hope that shouldn't bar us from accepting the plain fact that functional claims are not merely claims about use and that it is not completely mad to think that this distinction can be maintained, even if it needs further defending.

⁶⁸ One might be tempted to argue that we can bypass all function talk by thinking about 'value' or 'goodness' of rights. One might think, for example, that rights aren't the sort of thing that have *functions* and therefore we need to frame the discussion differently. In order to express a similar thought, one would be better placed to argue that instead of talking about the functions rights have, we should be focusing on what 'value' or 'goodness' that rights bring about.

I do concede that it is an attractive thought; for one thing, it seems even closer to what Feinberg himself has

3.2 The point, and the problem, of the will & interest theory according to Wenar

Now that we know what Wenar means by it, in this Section I want to explain how Wenar's use of 'function' can be helpful in our diagnosis of the state of the W/I Debate. In 'The Analysis of Rights' (2008) Wenar tries to find a way to move the W/I Debate forward by offering a fatal weakness that he considers to be common to both the will and interest theory. He sees the debate as being in a 'standoff' and offers the following reasoning:

Each of the two theories [will and interest] explains some but not all of the relevant phenomena—in this case, an ordinary understanding of rights. Each of the theories has attempted predictable responses to its own narrowness. None of these responses has been adequate, even after many variations have been advanced. It seems quite likely that the correct diagnosis of this situation is that each theory captures part of the truth about the nature of rights, but that each also has within it some unremovable premise that prevents it from capturing the whole truth... There must be some oversimplified view of rights entrenched within these theories that prevents them from framing a thesis that would account for all of the phenomena to be explained... Each of these theories appears to capture part—but only part—of the truth about what rights there

in mind when talking about the *value* and nature of rights being like a piece of moral furniture. Yet this seems to be a stronger claim, because to argue that rights have certain functions falls short of saying that these certain functions are what is *good* about right. Machine guns have the function of killing people. But one would be making a leap to conclude, *therefore*, that killing is what is *good* about machine guns. (It is true that there is a weak sense in which *as machine guns*, the ability to kill is a good thing about the guns. But I can't afford to go into that debate; and in any case, I doubt it will be particularly more illuminating than to stick to the plain function talk that I have been advocating. (Cf. von Wright's *The Variety of Goodness* (1963) on this point.) Therefore, I think we should simply stick to the language of function as I have defended it.

are. *The erroneous shared assumption must be that rights have a single function. The correct assumption therefore must be that rights have more functions than one. The difficulty faced by both will and interest theorists throughout their long debate is that they have each been advancing a monistic theory to account for pluralistic phenomena.* This explains why the debate between them has been unresolvable. Each side can claim a certain domain as its own, and cast counter-examples at the other side. But neither side can give up its focus on just one function of rights without giving up the basic character of its theory. Thus the theories are stuck in the stalemate (2008, p.269. Emphasis mine).

Essentially, Wenar's diagnosis is that both the will and the interest theories are committed to the implausible premise that there is *only one* function that rights have. In other words, what is wrong with both the will and the interest theory is identical: they are both committed to what Wenar calls the 'monistic thesis' regarding the function of rights. The only way to advance, naturally, is to embrace a meta-theory of rights which admits of multiple functions of rights—what Wenar aptly calls 'several function theory' in his 'The Nature of Rights' (2005).

In what follows, I will make a somewhat radical proposal. I think Wenar's suggestion here can go a lot further. His refocusing of the debate onto the functions of rights points to a way to transcend the two readings of the W/I Debate. Afterwards, I will claim that it is not obvious whether Wenar will happily sign up to my reshaping of the W/I Debate—because some of his views on the very set up of the debate are actually not clear.

3.3 A 'Meta-Theory' of rights

Following the argument in 3.2, I think we can propose a 'meta-theory of rights': (a) rights have more than one function. This, at this point, is not that different from what Wenar is proposing yet. But I think this meta-theory of rights has one very

interesting application: (b) it allows us to describe the disagreement between the will and interest theory *on both readings* (i.e. the *claim-right reading* and the *multi-incident reading*) in one stroke. It is on this latter point that I think I might depart from Wenar.⁶⁹

First, regarding (a), what makes this theory ‘meta’? To postulate ‘rights have more than one function’ is a meta-theory because, unlike the will or interest theory, it does not aspire to tell us what rights there actually are. This meta-theory says nothing about what counts as a right, and it gives no answer to substantive questions about what a right is, what a claim-right is, who is owed a directed duty, or any other normally contested issues in the literature. All one can say with the meta-theory at this point is merely that the ‘monistic function thesis’ doesn’t work, and that any plausible theory of rights must embrace the claim that rights have more than one function. To risk pedantry, this meta-theory is *a theory about theories of rights*—hence ‘meta’.

But most importantly, regarding (b), note how Wenar's diagnosis here opens up a new way for us to cut through all readings of what the W/I Debate is about. No matter whether one construes the W/I Debate as one about what ‘rights’ are among the Hohfeldian incidents (i.e. adopting the *multi-incident reading*), or what ‘claim-rights’ are (i.e. adopting the *claim-right reading*), both the will and interest theory can be said to invoke, implicitly perhaps, views about the functions of rights. In other words, by focusing on function-talk, we now have a unified way of looking at the W/I Debate inspired by Wenar. Imagine how we might explain the interest theory under *either* reading of the W/I Debate. For example, an interest theorist engaging in the debate under the *multi-incident reading* would argue that

⁶⁹ I say ‘maybe’ because it is not clear whether Wenar would agree with my approach. I shall return to this below. (See fn.69.)

some combinations of Hohfeldian incidents constitute rights because interests are being served by being the holder of those incidents. An interest theorist engaging in the debate under the *claim-right reading*, on the other hand, would argue that when locating the claim-right holder, we look at where the interests are, given we know who has a duty to do something. This much we already knew from Section 2. But now, we can further argue that both of them, despite clearly putting forward different substantive claims about rights and claim-rights respectively, rely on the same fundamental view about rights (or claim-rights) *being the sort of thing that serves interests*, i.e. they have the ‘interest-function’. The same goes for the will theorists under the two different readings of the W/I Debate. I see it as a merit of function-talk that it allows us to transcend and unify the different readings of the W/I Debate: No matter whether one finds the point of the W/I Debate to be one about ‘rights’ or ‘claim-rights’, the function-talk allows us to say that the will and interest theories are theories about what *function* rights or claim-rights have.

If my proposal here sounds plausible, then my account, focusing on the right holder’s being enabled by her right to make rights-backed demands on others, could contribute to the W/I Debate in a way that does not require us to disentangle the subtle but significantly different readings of the point of the W/I Debate. My contribution to the debate can aspire to go one level deeper than these different readings by adopting function-talk—something I will attempt in Section 4.⁷⁰

⁷⁰ As promised, I return briefly to the issue of whether Wenar might be happy with my use of his function-talk as the foundation of my meta-theory to unify both readings.

Recall Wenar himself has indeed talked about the W/I Debate under *both* readings (Cf. 2.1.1 & 2.1.2) and he uses the language of function to explain his view towards the W/I Debate under the *multi-incident reading* but the function-talk is curiously absent in the context of the *claim-right reading*. Consider: In his most recent contribution in the W/I Debate *under the claim-right reading*, he proposes a new account: what he calls a kind-desire theory of claim-rights, which very roughly goes: X has a

4 The W/I Debate: One step forward

Equipped with a new way to look at the W/I Debate in a unified way, in this section we can explore how my view might be relevant to this debate. Unsurprisingly, what I am going to claim is that in following Feinberg's insight we now have in front of us another function of rights: it is unclear to me whether there is a way to take Feinberg's insight as anything other than an articulation of what rights are *for*—in fact, we have already established this in explaining what Wenar could have meant by function. In the remainder of this chapter, I am going to briefly consider what sort of impact there will be in accepting Feinberg's insight (and by extension the account I have been defending). There is a big spoiler alert up front. The resulting theory might appear 'incomplete' to some—particularly if one is expecting a set of straightforward necessary and sufficient conditions from which rights or claim-rights flow. But my aim is not to come up with a set of such conditions—nor should they be the mark of contribution in the debate anyway.

claim-right against Y that Y ϕ -s *if and only if* Y has a duty to ϕ , and X (*qua* X) 'wants' Y to ϕ (2013). The details of his account are not relevant here. What is important is that during this discussion he does not employ the language of function at all, despite arguing in length that the kind-desire theory is 'extensionally superior' to both the will and interest theory *as a theory of claim-right*. (Cf. (2013), Section XVI) This makes one doubt if he wants his function-talk to be applicable to the W/I Debate *under the claim-right reading*. Perhaps he merely wants it to be applicable to the *multi-incident reading*. That is why I suspect he might be unconvinced by my extension of his insight.

One could indeed reply that Wenar can still hold that the function-talk of rights applies to both readings and stipulate that he merely drops the function talk for, say, stylistic or editorial reasons (because e.g. he wants to focus his readers on his own kind-desire theory as a theory of claim-rights and thus the function-talk is distracting). While reasonable, all this is guesswork until Wenar makes that clearer in future publications; and given nothing in my subsequent arguments hinges on Wenar's endorsement of my extension, I will set this issue aside.

4.1 A two-level model of the debates on rights

To begin with, I want to sketch a two-level model through which we can have a far better understanding of what is going on in the contemporary literature on rights.

The first, more concrete, level is where most of the contemporary discussions take place: this level includes the ‘two readings’ of the W/I Debate that I propose. On this level, theorists are debating over what ‘rights’ or ‘claim-rights’ are. Furthermore, the aim of theories on this level is to come up with a theory *about* rights and claim-rights.

The second level, on the other hand, is more abstract. It in some sense informs the first level debate: the second level debate is concerned with what *functions* rights have, and this view, in turn, determines the line that ought to be taken on the first, more concrete, level. What happens on this level is a more abstract discussion, in that the aim is not to articulate a set of necessary or sufficient conditions for rights’ existence (contra the first level). The focus is on what the point of rights, in general, is.

With this two-level model in hand, let us move on to my contribution. Recall what we have labelled Feinberg’s insight in Chapter 1: Rights enable a right holder to make demands or claims regarding her right in a way that is normatively significant. I shall call this enabling feature of rights the ‘demand-function’. In other words, to say that rights have the ‘demand-function’ just *is* to say that rights enable their holders to make rights-backed, authorized demands. Naturally then, the most obvious and straightforward contribution I can offer to the contemporary literature on rights is that there *is* a function of rights that is not sufficiently recognised: the demand-function. This contribution I make is firmly on the second level discussion: what I have proposed is an often neglected function of rights that sits alongside what we may call the ‘will-function’ and ‘interest-function’.

But things get a lot more complicated hereafter; how the highlighted demand-function ‘trickles down’ to impact on the state of the debate between the will and interest theory on the first level is going to be an exercise that I cannot afford to spend too much time on. In what follows, I am going to tease out very briefly some possible implications this has on the first level debate. A full exploration of the impact of acknowledging the demand-function of rights will have to be left for some other time, but I hope this will at least give an indication of what might follow from my arguments so far and how they might move the debate forward.

4.2 What my account has to say on the ‘first level’ debate

If one takes the demand-function of rights seriously and tries to defend a strong demand theory of rights under the *multi-incident reading* of the debate, one can perhaps adopt the following line. For some Hohfeldian incidents to count as rights, it is both necessary and sufficient that these combinations enable rights-backed, authorized demands of the ‘holders’ of these incidents. This will be a full-on ‘demand theory’ on the first level of the W/I Debate under the *multi-incident reading*.⁷¹ On the other hand, if one wants to have a full-on ‘demand theory’ that engages with the W/I Debate on the first level under the *claim-right reading*, one might propose something like the following: given Y has a duty to ϕ , X has a claim-right against Y that Y ϕ -s *iff* X can make rights-backed, authorized demands

⁷¹ I am actually unsure what, concretely, the resulting theory could look like. That is because I am quite sceptical of the possibility of any combination of Hohfeldian incidents being able to capture rights-backed, authorized demands. The closest I can think of is a Hohfeldian power—but still there is a difference between a right with a demand-function and a Hohfeldian power. If my suspicion is correct, we might in fact have a good reason to step away from relying so much on the Hohfeldian language to explicate our conceptualisation of rights—a point I highlighted in Section 4, Introduction. Potentially, this is another big contribution my account can make in the W/I Debate. I am optimistic about the prospect, but I will leave that exercise for now.

against Y's ϕ -ing.

I am not sure, however, how successful either of the attempts is. The first worry is that it is not clear whether the suggestion on the second level debate that rights have the demand-function ought to be taken as supporting a *necessary* condition for either rights or claim-rights on the first level discussion. One general important lesson we should take from Wenar's diagnosis of the W/I Debate is that there is in fact no good reason for us to think that all rights, in general, must serve one single function. Again, to quote him:

So far as an ordinary understanding of rights is concerned, any adequate analysis of the functions of rights must be pluralistic. *All rights perform at least one function, but there is no single function that all rights perform.* The idea of a pluralistic analysis of ordinary rights-talk is not a difficult one. Indeed for a concept such as the concept of rights... it might be thought that a pluralistic analysis would be the assumption by default (2008, p.270. Emphasis mine).

The key is that Wenar thinks, rightly, that while all rights have at least one of the functions which we think of rights as having, we should not expect every single right to have any given function. Thinking it is *necessary* that all rights must meet certain criteria built around one single function is an untenable position.

Going back to the first, more concrete, level of the theories of rights debate, this should make us sceptical of there being a necessary condition for rights or claim-rights built around demands alone. If we are thinking about the theories of rights debate under the *multi-incident reading*, it is just not clear why we would want to make the picking of Hohfeldian incidents which deserve the label 'rights' something *necessarily* about demands. Some combinations of Hohfeldian incidents might be about interests, some will or control, some demands; there is no good reason for us to think they don't count as rights just because some such

combinations don't have anything to do with demands. The same applies when we think about what a claim-right is. Even there, it is just not clear why we want to insist that in locating the claim-right holder and the directedness of duties, demands *must* be part of the story, given rights, in general, have more than just the demand-function.

Alternatively, is it possible to argue for a sufficient condition for rights under either the *multi-incident reading* or the *claim-right reading* in light of the demand-function? For example, if we want to focus on the *multi-incident reading*, is it possible to defend the claim 'if some combinations of Hohfeldian incidents enable rights-backed, authorized demands, then they are rights'?

On the most basic level, there is a sense that it is nonsensical to deny the truth of this claim—where else can the right come from, if these combinations of Hohfeldian incidents enable a *rights-backed* demand? However, it is also important to be clear why this is not, actually, a very big commitment even if we accept this claim. There is also a sense that it is almost uninteresting to say that 'if some combinations of Hohfeldian incidents enable rights-backed, authorized demands, then they are rights'. If these Hohfeldian incidents enable *rights-backed* demands, it is just not clear at all whether the sufficient condition tells us anything meaningful about rights and demands. The same applies to a similar sufficient condition for rights on the *claim-right reading*. If we were to assert that 'Given that Y has a duty to ϕ , if X can make rights-backed, authorized demands against Y's ϕ -ing *then* X has a claim-right against Y that Y ϕ -s', this will be equally true, but in a similarly uninformative and uninteresting way.

On the other hand, what I think my view shouldn't entail is for *non-rights-backed*, authorized demands to become part of the sufficient condition for rights on the concrete level debate. For example, under the *multi-incident reading*, the view I want

to reject goes roughly as follows: ‘if some Hohfeldian incidents enable their holders to make authorized demands, then these incidents count as right.’ I want to reject this because this confuses an important distinction embedded in my view. In Section 1.2, Chapter 2, I have drawn an important distinction between rights-backed, authorized demand and *non*-rights-backed, authorized demand. To hold that ‘if some Hohfeldian incidents enable their holders to make authorized demands, then these incidents count as rights’ risks collapsing that distinction: that will leave no room for demands being authorized in a way that doesn’t involve rights.⁷² The same analysis is true of making the demand-function a sufficient condition under the *claim-right reading*. To hold that ‘(assuming Y has a duty to ϕ) if X can make authorized demands about Y’s ϕ -ing, then X has a claim-right against Y that Y ϕ -s’ risks collapsing the same distinction in much the same way: we should allow for the possibility that there is something else (e.g. interpersonal relationship) that justifies X’s making of authorized demands about Y’s duty *in a (claim-)rights-free language*.

This concludes the admittedly sketchy elucidation of my possible contribution to the concrete level discussion. I have briefly suggested the possible, but in my view misguided, shape of a full-on ‘demand theory’, with necessary and sufficient conditions for the existence of rights and claim-rights, on the concrete level debate. I have also explained my doubts about whether they are tenable positions to hold. The lack of a full set of conditions for a right or a claim-right at the end of our enquiry should not be seen as an indication that my analysis yields no results or

⁷² I leave aside the question of which combinations of Hohfeldian incidents can be said to *authorize demands*. Again, I am rather sceptical as to whether we can ever give a story explaining how some Hohfeldian incidents can come together to authorize demands in the first place—rights-backed or not. But note that even if my scepticism is legitimate, this doesn’t mean my focus on demand in understanding rights is misguided. Rather, it again shows that perhaps we have been constrained unnecessarily by the Hohfeldian language in understanding the concept of rights—why expect the demand-function is going to manifest itself through Hohfeld’s language to begin with?

contribution. I am content to have clarified some issues in the debate. I have also drawn attention to the demand-function of rights, and argued that rights theorists ought to pay more attention to this in the future.

4.3 Preempting the challenge of piecemeal-ness on the second level debate

Finally, there is a challenge I feel the need to preempt on the second, more abstract, level of our discussion so far. In claiming that there is more than one function of rights, it might be deemed that the burden of proof rests on advocates of my view to say something about why, despite the different functions we stipulate that rights have, we are still content to call these functions the functions of *rights as one concept*. Would it not be more natural, for instance, to conclude that, actually, there are many concepts of rights and, for instance, each distinct concept matches up with one of the functions we identify?

I have a few things to say in response to this. First, despite the fact that this sounds like a formidable challenge, there have been attempts to answer this challenge which are, in my view, not implausible. Wenar himself has attempted just that. He proposes a quasi-historical account explaining how these different functions come to unite under one concept⁷³. Furthermore, while I do not have a ready-made answer up my sleeve, it can be reasonably assumed that an actual, probably complex, historical account can be supplied to explain why a single concept comes to appropriate more and more functions as it gets used in broader and broader contexts. After all, such examples are everywhere in the history of ideas. Similar lines can be run, for instance, to explain how the different conceptions of 'liberty' fall under a single concept. (I am, of course, having Isaiah Berlin (1958) in mind.)

Furthermore, I think the appropriate question we must actually ask here is not *if*

⁷³ Private discussion and seminars presented at King's College London and Stirling, 2010-12

such a story can be given to tie the different functions together; the question we should really be asking is, rather, *what* such a story would look like. I say this because I am not convinced that it is actually fair to demand from me an explanation concerning the connecting story among these different functions of rights. If we are indeed convinced that there is more than one function which rights have, surely the right way to move our analysis forward is to consider *how* that fact comes about, and not to, relying on some theoretical commitment about what a theory of rights ought to look like before we do the expository work, question the very *discovery* that we have made about the functions of rights. This argument touches upon some very fundamental methodological issues that I do not have time to go through, but it hinges on, for example, how committed we are to the 'discoveries' we have made in our usages of rights, and what weight we give these natural usages in our theorising. (This strong anti-revisionary sentiment is not unique to me. For example, Cruft (2004) too makes it explicit that it should be a constraint on what our theory of rights ought to look like.)

Finally, it is unclear to me whether alternatives to the view I defend fare any better when pressed to offer a unifying story. Given we have established that there is indeed more than one function 'rights' have, how else—were we uncomfortable with the thought that rights can have different functions—can we accommodate these findings? One way I have suggested is to argue that, actually, there are different 'concepts' of rights in play here (instead of saying there are many functions that rights have). These different concepts of rights are in turn being picked out by, or at least they map on to, different functions. This, one might think, allows us to bypass the need to come up with a unifying story like the one Wenar supplies: we can say, perhaps, for each function that we have identified, we have a different concept of right.

But I submit it is wishful thinking to assume that this way of thinking avoids the

need to provide a unifying story nonetheless. As a case in point, Siegfried Van Duffel (2012) recently argues that there are *different kinds* of rights.⁷⁴ Confining himself to the debate between the will and interest theory, Van Duffel argues that these theories should be understood as accounts of two *different, distinct kinds* of rights, and that the W/I Debate rests on what he calls a 'mistake': it is an error to assume that the will and interest theorists are disagreeing over *one* concept when they are, in fact, theories about different things entirely. Now I am not sure how much a view like this helps in brushing off the need to come up with a unifying story, because, as Van Duffel himself admits, his view still faces the yet-to-be-solved problem of accounting for the ubiquitous practice of lumping the two different concepts together. In other words, even if we accept that the will and interest theories are picking out *different concepts* of rights altogether, a similar question remains: why do we still use the same label, i.e. 'rights', for them? Van Duffel's own hand-wavy suggestion at the end of his piece, almost added as an afterthought, is that the unifying story given, whatever it looks like, must be a 'historical' one—not dissimilar to, in fact, what Wenar has proposed. This is telling. Thus rendered, the challenge facing those who argue that functions pick out different concepts of rights looks merely like another version of the same challenge Wenar and I originally face. A connecting story of some sort must still be given to explain why different concepts of rights come to be associated with one another, under one single label. The alternative to my approach faces an almost identical problem.

5 Conclusion

This Chapter is intended to explore the implications my account has for the current literature on rights. In Sections 1-2, I have argued that, despite most theorists simply

⁷⁴ Van Duffel doesn't use the term 'function', but what he defends is very similar in spirit to Wenar's several function theory—at least on the meta-theory level.

treating the current debate over rights as a debate between the will theory and interest theory, the actual state of the debate is a lot less focused than this simple division suggests and can be read in two ways. I labelled them the *multi-incident* and *claim-right* reading, corresponding to what, in fact, the objects of dispute are among the theorists in the debate respectively. In Section 3, I argued that there is a way, inspired by Wenar's language, to 'unify' the two readings of the debate, and that is via the language of 'functions'. In Section 4, I argued, first, that there is in fact a two-level debate going on. The more concrete level is the one that can be read in the two aforementioned ways. This is the level that deals with questions such as 'what rights are' or 'what claim-rights are'. But this level of the discussion is, I think, guided by the discussion on another level; this is the second level that I call more abstract. On this level, the question being dealt with is a more general one: concerning the 'function' of rights. I argued that the most obvious contribution my account has for rights is that the demand-function of rights has been much neglected in the literature, and to draw attention to this omission—and pinpoint how it fits into the debate—is, I think, my view's biggest implication of all. The fact that we do not have a set of conditions for a right's or a claim-right's existence should not, I maintain, be treated as a failure on my part.

Part III

Demands and Philosophical Accounts of Human Rights

Chapter 5

In this final part of my thesis I will detail some other implications my account has on the contemporary discussion of rights (other than what we have already covered in Part II, i.e. the long-standing debate between the will and interest theory of rights). The area in which I think some additional contribution can be made is specifically the philosophical discussion of human rights.

To say the literature on human rights is enormous is an understatement, and a comprehensive discussion of theories of human rights will require at least a book-length treatment. I am not going to do that here. What I want to focus on instead is a debate over what has been known as 'welfare human rights', because I think my view has something interesting to contribute here. Let me briefly give some context to the debate. Broadly speaking, welfare rights are what some people call 'rights to goods and services'. Paradigmatic welfare rights include the human right to healthcare and other kinds of subsistence and are usually contrasted with 'liberty human rights'. They are different—and this is why welfare human rights are seen by many as particularly problematic—because of the content of these rights: they are *rights to the provision of something*, which involves the problematic question 'who owes it to the right holder to provide the content of the right?'. It is on this ground that some theorists want to claim there are no welfare human rights. I will explain why this question is more difficult to answer when it comes to welfare rights but not so when it comes to liberty human rights. This will be the first half of this chapter.

The second half will be an argument against the critics of welfare rights. I am going to make Onora O'Neill's argument against human rights my target. I will argue that her argument rests on a fundamental oversight regarding one of the values of rights. To understand my criticism, we have to, I argue, once again return to the

fundamental question concerning what rights are for. I will conclude that O'Neill hasn't given us a strong argument against the status quo of the human rights discourse.

1 Philosophical accounts of human rights: Setting the stage

If one finds oneself interested in the philosophy of human rights, there are indeed all too many questions one can ask. The most fundamental question one can ask is whether there are actually such things as human rights to begin with. Now it is rather uncommon for a political or moral philosopher to adopt the view that there just aren't any human rights at all (because that involves denying that there are any human rights of any kind even in the weakest positivist legal sense), but the consensus that there are human rights doesn't actually get us anywhere. That is because the affirmative answer conceals the vast differences in just what everyone seems to think human rights are.⁷⁵

But even among those who are not sceptical about the existence of human rights, they disagree over many things, like what kind of rights human rights are (legal and/or moral), how human rights are justified (dignity, interests etc.), and what substantive list of human rights is the correct one (for example whether it should be expansive or restrictive), etc. It is unclear to me whether my account would have a

⁷⁵ It has also become popular to adopt a position that is, somewhat paradoxically, both sceptical and faithful to human rights. This view suggests that the best way to think about human rights is to think of them as *something else*. For example, James Nickel has suggested human rights perhaps are best conceived of as some kind of 'rights-goal hybrid'. Nickel himself seems to want to avoid the further claim that this view of human rights amounts to a kind of scepticism: by understanding human rights as a sort rights-goal hybrid, he wants to maintain that they are 'real' rights, though not in the traditional sense. I have my scepticism about whether this is a coherent position to hold, but I will leave this issue aside. For his own discussion on this point, see his (2014), particularly in Section 3.4 where he talks about 'social rights'.

lot to say about these debates. For example, it is not clear to me how my account can make a contribution to the debate between whether human rights are moral or legal rights, because my account is supposed to be about the nature of rights, period.⁷⁶ My account's contribution to the debate on how human rights are justified is also not clear; my suggestion is what what my account has to say seems compatible with a lot of the popular ways of justifying human rights. Furthermore, my account seems to be compatible with both an expansive and restrictive list of human rights (unless one takes 'expansive' and 'restrictive' to be narrowly about whether we can have welfare human rights—in which case my following arguments will be precisely on this point).

Hence, I am not going to go over all of these debates. Instead, I want to focus on one particular critique of human rights that allows me to demonstrate how my account can make a contribution. I want to argue that O'Neill's critique of welfare human rights is misguided. In the next section I will introduce O'Neill's critique.

2 Onora O'Neill and the 'claimability' objection

O'Neill is sceptical of the rights idiom, at least part of it. Throughout a series of publications, she articulates a strong case against the existence of a subclass of human rights, most prominently in her *Towards Justice and Virtue* (1996) and "The

⁷⁶ What my account has to say about legal rights that are clearly not morally justified is an interesting question. There, it seems to me not implausible to think 'functions' of rights are in some sense a 'legal' function, and that what I have been calling the 'demand-function' of rights is in some sense a 'demand-function' in a legal sense, in that having a legal but morally unjustified right still enables the right holder to make some legal-rights-backed, legally authorized demands. A thorough analysis of what sort of impact, legally-speaking, legal-rights-backed, legally authorized demands might have will have to be left for another time, but I think most of what I have said so far could still apply—as long as we understand the impact we have discussed so far in a purely legal way.

Dark Side of Human Rights' (2005). To speak of the welfare human rights of those who she thinks just couldn't have them, for reasons going to be explained below, is 'a bitter mockery to the poor and needy' (1996, p.133). She also accuses those who place a secondary importance on duties of neglecting a big and important part of the ethical discourse: the problem of specifying duties.

To ground her argument, O'Neill begins by drawing an important distinction between universal rights (of which liberty human rights are considered to be 'paradigm cases') and welfare rights (what she calls universal rights to goods and services). The difference between the two is that universal rights require only universal negative duties in establishing the correlation between rights and duties, while the welfare rights require positive duties.

The problem for welfare rights as human rights lies in the 'implausibility' of speaking of their correlative positive duties. O'Neill's insight is that for liberty human rights, it is clear what everyone has to do (as their duty) for the right of someone to X to be 'complete': everyone else abstaining from obstructing me from X-ing; whereas with welfare human rights, there is no way to determine the corresponding obligations in the absence of institutions, leaving those obligations unspecified and muddled, or 'dangling in the air'. The idea of duties being 'unspecified' requires more elaboration; I deal with this in the remarks below.

A couple of observations should be made before we go on to evaluate O'Neill's argument. **First**, O'Neill is focusing on the *claimability* rather than the *enforceability* of rights. She concedes that the correlation between welfare human rights and liberty human rights and their corresponding duties could be the same when it comes to *enforcement*: both kinds of rights require the existence of institutions to be enforced; my liberty rights of, say, being free from violence depend on an effective institution (a police force, for instance) as much as my welfare rights to, say,

minimal food and healthcare do (say, an institution that takes the form of a governmental body which has the power of effectively distributing food or other resources in society). On this, I agree with O'Neill wholeheartedly: it doesn't take a (moral) right to be enforceable to be a (moral) right. Enforceability isn't a proper existence condition for rights; it is not the issue at stake.⁷⁷

However with *claimability*, things are different; while liberty rights can be *claimed* unproblematically without an effective institution as a backdrop – i.e. claiming it against *everyone else*, O'Neill argues that 'rights to goods and services can be claimed or waived *only if* a system of assigning agents to recipients has already been established, by which the counterpart obligations are 'distributed' (1996, p.131. Emphasis original)'. It is the *claimability* (or, so she argues, the lack thereof) as a feature of welfare human rights that O'Neill finds fault with.

One way to make sense of this distinction between welfare and liberty human rights regarding claimability is to look at the following examples: a right to life (a liberty human right) vs. a right to education (a welfare human right). Suppose I do in fact have both of these rights. Two sets of questions can then be asked if we are to follow O'Neill's structure of thought, namely, i) 'are my rights claimable?' and ii) 'are my rights enforceable?'

For my right to life, which is a liberty human right, to be claimable, it has to be identified who the duty bearer(s) of the duties that correspond to my right to life are. And, it appears, if everyone has the duty not to kill me or to obstruct me from living, my right to life is claimable. Whether it is enforceable is a different matter: as mentioned, O'Neill isn't opposed to the idea that a liberty human right, e.g. the right to life, requires institutions on the enforceability level. So a liberty human right

⁷⁷ Cf. Raymond Geuss who seems to think it is. See Geuss (2004, especially p.144).

could be claimable but not enforceable when we are assuming, as O'Neill does, that the relevant institution to enforce my liberty right to life is absent.

Let us then turn to the right to education, which is a welfare human right. Like the right to life on the enforceability level, O'Neill thinks institutions are required for the right to be enforceable; without an institution, it is difficult to conceive of how education can be 'delivered' given how education as goods or services depends on the existence of institutions: it isn't clear how, without any form of institutions, anyone can receive education as we know it today in the West, let alone getting a right to education 'enforced'. This shouldn't be surprising. But what is important is that a right to education (unlike a right to life) *isn't even claimable* when there is no relevant institutions existing: you need to have someone to whom you can make a claim for a right to be claimable; and given how education cannot be met by universal obligation (in the sense that 'everyone doing their fair share' isn't going to straightforwardly bring about a system of education that people can enjoy), it is impossible, O'Neill argues, to make a claim without an institution. Such is the difference between claimability and enforceability: the latter concerns with the actual 'delivery' of the content of the right while the former concerns with whether there is someone or some parties available for you to make a claim against—whether there is someone or some parties for the duties corresponding to your rights can be 'lodged', as it were. The latter points to some 'structural problems', in the logical sense, of welfare human rights.

Second, it is interesting to note that O'Neill uses a number of expressions interchangeably when she addresses the problem with the allocation of duties: 'allocation', 'distribution', 'where claims should be lodged', to name a few. Although she doesn't explicitly specify what the problem of allocation is, from her choice of expressions we can, I believe, safely conclude that one of her concerns is the question of *whom*: for O'Neill, determining who the bearer(s) of the corresponding

duties is (or are) is essential for a right to be claimable.

Third, another aspect of the problem O'Neill concentrates on is the *content*:

'Unfortunately much writing and rhetoric on rights heedlessly proclaims universal rights to goods or services, and in particular 'welfare rights', as well as to other social, economic and cultural rights that are prominent in international Charters and Declarations, without showing what connects each presumed right-holder to some specified obligation-bearer(s), which leaves the *content* of these supposed rights wholly obscure' (1996, p.131-2. Emphasis mine). Hence, when O'Neill talks about rights being unspecified, it is useful to remember that she can be referring to any, or both, of the features of rights that she thinks could be unspecific: the correlative duty-bearers, and the content of the correlative duties themselves. Thus, when O'Neill talks about the corresponding duties of a right being unspecified, she can have both *content* and *bearer* of the duties in mind.

(I am going to leave it open as to whether the 'who' and the 'what' issues are distinct. Some might find it natural to think that the 'what' issue is just a consequent of the 'who' issue, with the following reasoning: if we know what has to be done for a right to be met, knowing 'who' has responsibility to do something about it will naturally give us the answer to what, individually, has to be done. But some might think this is too simplistic, because it is, one might think, too simple-minded to assume that the way to translate collective responsibility to individual responsibility will be unproblematic and straightforward, hence the question of 'who' and 'what' remain distinct questions, as least in the sense that they might require different, or additional, solutions.)

Lastly, and very importantly, O'Neill sees claimability as a necessary condition for the completeness of rights. She writes: '... universal rights to goods and services and the corresponding obligations to provide them cannot be antecedently identifiable

in the same way that liberty rights and their corresponding obligations are antecedently identifiable... Without institutions, supposed universal rights to goods and services are *radically incomplete*' (1996, p.133-4. Emphasis mine). The thought here is that welfare rights require institutions to make them claimable; and without institutions, O'Neill thinks that these welfare rights are incomplete. I will follow Tasioulas (2007) in interpreting this as O'Neill's view on a right's *existence condition*.

Given these remarks, let us identify the principles that O'Neill is committed to. Most fundamentally, O'Neill thinks that rights have to be claimable. Let us call this the *Claimability Thesis*. Furthermore, for rights to be **claimable**, it has to be true that the corresponding duties of a right have to be **specified** in the following ways: it can be determined i) who the *bearers* of those duties corresponding to the right are, and ii) what the *content* of those corresponding duties is.⁷⁸ Let us call this latter principle the *Specifiability Thesis*. One might wonder whether it is necessary to come up with two separate but connected theses to capture O'Neill's argument. I think it is. The reason is that this distinction allows us to better capture the strategy some theorists employ in undermining O'Neill's position (see Section 4 of this chapter).

Now, we can represent O'Neill's argument in a more structured way: her main charge is that, given the *Claimability Thesis* and the *Specifiability Thesis*, welfare human 'rights' are not genuine rights. Thus, to flesh out with an example, a welfare human right to some minimal welfare provision will not be a genuine right, because it doesn't conform to the *Claimability Thesis*, in the sense that this is the kind of 'right' where the duties that correspond to this purported right are not specifiable

⁷⁸ To say it is necessary that the bearers and content of the duties 'can' be specified must mean something quite strong, in that it wouldn't be enough for just *any* story about the specification is proposed. To satisfy this condition, the 'correct' specification is needed. This is important when we get to Section 4.2 & 4.4.

(as defined by the *Specifiability Thesis*). And, crucially, the same will be true of a lot of important welfare human rights that we have good *prima facie* reasons to think of as genuine rights—for example, and very importantly so, the rights listed under article 24 and 25 of the Universal Declaration of Human Rights, i.e. the right to healthcare and right to education. This should be sufficiently unsettling for anyone who wishes to defend the human rights discourse in a recognisable form.

3 My reply: Some preliminaries

I will demonstrate how I think my account can make some interesting contribution to this debate over whether O'Neill's critique is correct.

My view is that O'Neill's worry is misguided; I also think the *Claimability Thesis* is itself misguided. It is important to note upfront that O'Neill's critique is not misguided because there is any inherent incoherence in her position. This is not meant to be an internal-critique-style exercise. Rather, it is misguided because, by insisting all rights have to be claimable, it embodies a deeper view about the nature of rights which turns out to be problematic. In this section, I will say more about this underlying view of the nature of rights that supposedly grounds the *Claimability Thesis*, and further contend that, if what I have been arguing so far in this thesis is right, it should make us sceptical towards O'Neill's view of welfare human rights as a whole.

So what is the underlying assumption about the function of rights that I think O'Neill is committed to? I want to argue that the *Claimability Thesis*, as a necessary requirement of rights (unless we see this as a 'dogmatic' conviction about the nature of rights, but I don't think we have any evidence to think that is true) must be

postulated to be true for a reason. This reason must be spelt out before we can truly answer O'Neill's worry. So what is this reason? It should be obvious that O'Neill thinks that all rights have to be *action-guiding*, and the *Claimability Thesis* is best read as a way to capture that thought.⁷⁹ The reasoning O'Neill has for this is that for X to be a right holder, if the right in question is unclaimable, there is no point in having it because claimability guarantees that the right in question is not 'empty' or 'mere rhetoric'—it specifies *who* has a duty, corresponding to X's right, to *do what*. In other words, in the case of welfare human rights, X will have a so-called right to something (goods and services) but the 'right' would have no impact or guidance on who should do what—and that, in itself, is a worry, O'Neill would argue. I call this the worry of action-guidingness.

For O'Neill then, the danger of rights-talk in general, of which human-rights-talk (in particular *welfare* human-rights-talk) is an exemplar case, is that often it is not clear what implications there are in terms of practical reasoning for *agents*. It is essential to the 'defect' of human-rights-talk that it focuses on what she calls 'recipients' rather than 'agents'. This charge is obvious in O'Neill's writing in multiple places. For instance, she says pointedly:

Practical reasoning that assigns priority to rights and to recipience rather than to obligation and to action is an unnecessary and damaging, if distinctive, feature of contemporary writing on ethics... For once rights rather than obligations are treated as the basic deontic category, both obligations which lack corresponding rights unless institutions are built, and those which lack corresponding rights altogether are quite simply hidden from view (1996, p.140).

⁷⁹ I sincerely thank Simon Hope for the repeated and prolonged discussion he has had with me on this point in the past four years.

Here, we see O'Neill claims that by focusing on *rights* and *recipients* instead of *obligations* and *agents*, something important is 'hidden from view'. But what is the problem with that? What exactly is hidden from view? The problem I think is that according to such a view, *practically*, we are no wiser whatsoever. Such a view, with a focus on rights and recipients, offers no answers to a set of important questions—or, even, the only set of important questions. As O'Neill further explains specifically what is worrying about any view that takes the perspective of the recipient:

When the perspective of recipient is taken as the starting point of practical reasoning, the more traditional and more obviously *practical* questions about ethical requirements, such as 'What ought we (or: I) do?', 'How should we (or: I) live?' and 'What is to be done?' will be answered only as a secondary and derivative matter (1996, p.128).

With her obvious concern about the demotion of what Bernard Williams (1985, Ch.1) would call Socrates' question, I propose that O'Neill's most deep-seated worry about welfare human rights is not *merely* that they are not claimable. Of course, that they are not claimable is problematic, but claimability itself is not the *root* of the worry. The real problem is that it is not clear how speaking of welfare human rights helps in terms of answering all these *practical* questions that O'Neill lists: and, hence, it leaves the action-guidingness of the human-rights-talk wholly obscure.⁸⁰ To miss this point is to miss the very point of O'Neill's argument.

To reiterate, I propose the following reading of O'Neill's most deep-seated worry:

⁸⁰ By *practical* I mean of course not 'pragmatic' or 'realistic'—I am using the word 'practical' here as philosophers of practical reasoning would. Practical here means, roughly, 'with a view to action'. This explanation comes from John Finnis (1980, Ch.1).

The central thought is that rights *have* to be action-guiding and, hence, claimable, because that's what rights are for; a failure in tackling this point makes any defence of human rights fall short of answering the *practical* worry of action-guidingness. Note that, dialectically, this short section is very important, because I think it is a lack of sensitivity to this *practical* concern of O'Neill's that makes a lot of the rebuttals to O'Neill out there unsatisfactory. I am going to come to this point immediately below.

4 Why existing replies to O'Neill are inadequate

Before I present my argument against O'Neill, in this section I want to rule out some appealing but, I argue, ultimately not successful arguments against her. This will enable us to better appreciate why my contribution, to come later in this chapter, is particularly valuable. There are a lot of attempts in the literature to try to answer this challenge, either directly or indirectly. I think they can roughly be divided into the following categories.

4.1 Attempt 1 (All human rights—be it welfare or liberty—are equally unclaimable)

To start off, a quite natural thought one could have is to question the distinction O'Neill relies her argument upon. For example, Tasioulas remarks:

O'Neill is taking a difference of degree—relating to how much we can typically know about counterpart obligations independently of the establishment of institutional structures—and converting it into a difference of kind, i.e. that welfare rights are institutionally-dependent for their very existence, whereas liberty rights are not (2007, p. 90).

Taking Tasioulas's cue here, perhaps one can argue that the distinction between

liberty rights and welfare rights is a false dichotomy—since liberty rights are, too, institutionally-dependent. A difference in degree does not warrant the strong conclusion O'Neill draws from it.⁸¹ All human rights—be it liberty or welfare human rights—are, to an extent, institutionally dependent and hence unclaimable independent of institutions, because it follows that even liberty rights would not be genuine rights, given the *Claimability Thesis* and the *Specifiability Thesis*. This, on the face of it, suggests a mistake in O'Neill's argument.

Response to 1

But O'Neill would deny that this is a problem, for she could (and indeed does, as I have to an extent covered in Section 2) answer by defending the distinction via arguing that both liberty and welfare human rights are indeed dependent upon institutions, *but only insofar as enforcement is concerned*. As already shown (again, in Section 2), O'Neill has no objection to the idea that both liberty and welfare human rights are institutionally-dependent when *enforcement* is at stake:

... universal rights to goods and services, such as welfare rights, are in fact unlike liberty rights. It is true that rights of both sorts need institutional structures for their *enforcement*, but liberty rights do not need institutional structures to be claimable and waivable. By contrast rights to goods and services can be claimed or waived *only* if a system of assigning agents to recipients has already been established by which the counterpart obligations are 'distributed' (1996, p.131).

What the Tasioulas-inspired argument has *not* adequately shown is that beyond enforceability, when it comes to *claimability*, how liberty rights are too

⁸¹ Henry Shue had similar arguments in his *Basic Rights*. Shue (1980, Ch.2)

institutionally-dependent. Consider Tasioulas's line again:

Even if we assume a meaningful distinction between negative and positive duties, all rights will typically have as counterparts duties of both sorts. Thus, some of the most important obligations corresponding to universal liberty rights are positive. The right not to be tortured ordinarily imposes duties on the state, for example, to establish and maintain an adequate police force, judiciary and penal system and to variously empower and constrain officials who operate these institutions to honor that rights themselves, and to prevent and punish infringements of it by others. (2007, p.90)

However, it would seem that the sort of positive, institutionally-dependent duties that Tasioulas assigns as corresponding to liberty human rights are not done so on the *claimability* level; rather, they are on the *enforceability* level. Take the example he uses: the liberty human rights not to be tortured and the corresponding positive obligations on the state. O'Neill can argue that the corresponding relation exists on the enforceability level: sure, for me to *enjoy* the right not to be tortured, I need protection from a reliable police force to secure that right. If I suspect someone is sneaking into my house in the middle of the night with the intention of torturing me, I would not think about the *claimability* of my rights; I would reach straight to the telephone and notify the police to get my rights *enforced*. But that is, bluntly, an instance of me getting that right *enforced*.

On the other hand, if all I am focusing on is the claimability of my right, the existence of a state or a relevant institution is not necessarily a condition for my claim. Imagine that, before the police arrive, I can make a claim against my torturer, that they have a duty not to torture me given the fact that I have a liberty human right not to be tortured. True, it might be of no use at all in preventing oneself from actually being tortured, but again, 'probability of successful intervention' here has

nothing to do with the *claimability* of the right. The point about claimability, as O'Neill insists, deals with the *logical structure* of rights. O'Neill remains correct, in my view, in saying that *on the claimability level* the two kinds of rights are different: insofar as claimability is concerned, a liberty human right only correlates with negative duties but welfare human rights *must* correlate with some positive, institutionally-dependent duties. Consequently, Tasioulas does not seem to have adequately argued against the distinction O'Neill draws between liberty and welfare human rights; at least on the claimability level, this difference remains to be one in kind, rather than degree.⁸² This shortcoming in Tasioulas's argument is crucial because it directly leads us back to the *Claimability Thesis*. If Tasioulas fails to argue that, on the claimability level, liberty and welfare human rights are similarly correlated to both positive, institutionally-dependent duties, his criticism against O'Neill fails.

4.2 Attempt 2A (Welfare human rights are, actually, claimable)

Another way to deal with O'Neill's challenge is to accept the *Claimability Thesis* and the *Specifiability Thesis* as they stand, but argue that, contra O'Neill, welfare rights as human rights, actually, satisfy the *Claimability Thesis*. Under this view, welfare rights

⁸² Furthermore, it could be argued that Tasioulas actually makes a rather quick jump in his argument, in that he is assuming by showing liberty rights entails both positive and negative duties, he thereby shows that the distinction between liberty rights and welfare rights is not well-supported.

But this is obviously too quick, because one might think that the distinction between liberty and welfare human rights better maps up to the distinction between *perfect* duties and *imperfect* duties instead; O'Neill adopts a similar position. Here in this paragraph, I have been following Tasioulas's strategy in attacking that distinction between liberty rights and welfare rights via arguing they don't match up with the distinction between negative and positive rights. This doesn't mean that I agree with the assumption entirely—I will just leave this further criticism of Tasioulas's treatment of O'Neill's argument aside.

*are claimable even in O'Neill's own terms.*⁸³

Proponents of this view will insist that duty bearers and the content of the duty corresponding to welfare human rights, even in the absence of political institutions, are actually specifiable—in the sense that there is indeed a correct answer to the question of 'who has to do what', and that we need to, in a sense, do some moral philosophy to find (or 'uncover') the answer. It is true, they might concede, that there are disagreements over how these duties are to be specified, yet it doesn't mean that they *can't* be specified. How the specification is going to work shall be informed by some separate story about the distribution of these responsibilities. Crucially, to provide this story is a 'separate issue' (Miller's own words, lifted from (2012, fn.1)) from the *existence* of human rights. Any disagreement on what the story is like is not in itself an objection to the very having of a welfare human right. Theorists of this kind I am having in mind might take themselves to be inspired by David Miller's view on human rights. Miller, for example, thinks the story of distributing responsibilities goes (roughly) as follows:

[The human right holders] are owed this in the first place by those who wield power in the places they are living – by their governments, in the normal case. But if for some reason the local power-holders are unable or unwilling to deliver this minimum set of entitlements, then responsibility will fall on people and governments in other countries to overcome the deficiency (2012, p.409-410).

Thus, to answer O'Neill's worry, this attempt says the criticism is false on almost

⁸³ Such a view as a direct response to O'Neill's worry has been suggested by David Miller in conversation at a conference on Human Rights at University of Stirling but not, as far as I know, pursued in writing. See also the note at the end of this section, where I talk about another reply that Miller gives in print.

factual ground in maintaining that welfare human rights are not claimable; theorists like Miller think it is possible to provide important—but *separate*—accounts suggesting just how the specification exactly works.⁸⁴

(Note that it is important to point out this is not Miller's actual pointed reaction to O'Neill's worry. Miller's actual reasoning for rejecting O'Neill's point is more similar to what we will discuss in attempt 3. See Miller (2007), especially p.193-194, and the paragraph leading to fn. 41.)

4.3 Attempt 2B (Welfare rights are, actually, claimable—if we modify our account of claimability)

A similar attempt can be made along the line of Elizabeth Ashford's argument. She holds that, contra O'Neill, welfare rights are actually claimable. The difference with the previous, related, attempt which I have labelled 2A is that Ashford seems to want to accept the *Claimability Thesis* while challenging what O'Neill thinks about Claimability itself (whereas Attempt 2A does *not* seek to challenge what O'Neill thinks about Claimability—2A claims, rather, that O'Neill's insistence is fine: it's just she is wrong about the application of her own claimability assessment). Let me explain.

Ashford's argument against O'Neill begins with the insightful observation that a lot

⁸⁴ Another inspiration for this kind of reply to O'Neill might be Leif Wenar's suggestion that, like most contexts when basic human well-being is at stake, responsibility for human rights violation should be distributed according to the *least-cost principle*, barring certain exceptions, and through a succession of what he calls 'expansion of the assignment of responsibility' when the party who has primary responsibility fails to take up the responsibility. The details of the story do not matter. What is important is that given Wenar's confidence in the possibility (and relative ease) of articulating who the bearers of these responsibilities corresponding to human rights are, one can build on that and construct a reply to O'Neill along 2A. See Wenar (2007); especially p.270-4.

of what we call human rights violations have very complex stories leading to the violation itself. Many gross violations of human rights—be it liberty or welfare human rights—are results of many direct or indirect involvements of a variety of agents. The result of this is a breakdown of what Ashford calls the traditional 'paradigm' of human rights violation, i.e. one that sees violation as a matter between one or some specific agent(s) as perpetrators and one or some specific agent(s) as victims. We should, Ashford urges, take seriously the suggestions that a lot of what we want to call human rights violations do not admit of a simple and straightforward story about the identity of the perpetrators.

Respecting this point, Ashford thinks, should lead us to reject O'Neill's account of claimability. I quote at length to show the point:

O'Neill is assuming a picture of claimability according to which the victim has a claim against a specific agent or agents to act or refrain from acting in a certain specific way... This picture cannot acknowledge cases in which responsibility for human rights violations is very broadly shared by a huge group of agents and the duties not to contribute to such violations have not been specified and allocated among particular members of the group... When these agents cannot avoid the harms they individually cause, victims have a claim against them that they take the action to reform the system and to mitigate the harms it causes. The task of reforming the system is a shared one that has not been allocated among agents... Nevertheless, the claim that can be made against them by victims of the system is not empty. *It is a claim that for their sake they do take this initiative, and each accept their share of responsibility for the harms caused by the system and take action accordingly, rather than continuing to collaborate in it.* This is genuine claimability, because it articulates a demand each victim can make against all those who participate in the system that harms them and who fail to take enough action toward reforming it... (2007, p.216. Emphasis

mine)

One might be tempted to think, judging from wording of the quote above, that Ashford's argument is aimed specifically at liberty human rights and negative duties, since her focus here is the duty *not to contribute to human rights violations*. But she reasons similarly regarding welfare human rights:

... people possess the human right to secure access to basic necessities before the positive duty to guarantee this right has been institutionally defined and allocated. In the absence of just institutions, again, the onus is on individual agents to take the initiative in deciding how to implement their share of this duty and to seek to institutionalize the task. And again, *the right-holders' claim is a claim against every agent who is not doing enough to implement their share of the shared duty* (2007, p.217. Emphasis mine).

To sum things up, it seems Ashford is advancing an account of claimability that is in direct contradiction with the *Specifiability Thesis*. Claimability here, as Ashford uses the notion, seems much looser than O'Neill's formulation, such that a right is *claimable even if there is no one in particular we can point to and say he or she has to do this or that as the corresponding duty of a right*. This strong view of claimability is deemed impossible according to Ashford, given the 'revised' paradigm of human rights violation. Rather, it is deemed enough for a right to be claimable, under her view, when the right has corresponding obligations, borne by those involved in contributing to the violation, or *even just every agent who is not doing enough*, whatever that covers, to bring about just institutions—either to take the initiative in reforming an institution that causes harm, or to establish an institution in order to secure access to basic necessities. (What the 'every' locution covers here is tricky—I am returning to this below.) And this seems to be the level of specificity of both the content and the bearers of the duty we can hope to achieve in specifying the

corresponding obligations of human rights, both positive and negative.

One dialectical point is worth reiterating here before we move on. Note, again, that Ashford's strategy is not to contradict the *Claimability Thesis* itself. She seems to be happy with the claim that rights have to be claimable. (At least nothing seems to suggest that she doesn't think rights have to be claimable.) What she does, on the other hand, is to *challenge the conditions there are for a purported right to be claimable*. Her expanded understanding of claimability will make a right being claimable despite not fulfilling the two conditions that O'Neill thinks necessary (as listed in the *Specifiability Thesis*): specifying *who* has to do *what* corresponding to a right, and is, thus, different from 2A.

A final remark on 2B: I won't go into the textual details here but James Griffin also appears to have a similar reply to O'Neill's worry. He writes: '... there is a form of claimability requirement on human rights, weaker than the earlier ones [read: he cited O'Neill's view immediately above], that we must accept... The strongest defensible requirement is that a claim generated by a claim must be a claim on someone *specifiable in words, though not necessarily confrontable in flesh and blood*' (Griffin, 2008, p.109. Emphasis mine). I read this as an attempt to, again, preserve the requirement of claimability but modifying the claimability condition such that welfare human rights are, too, claimable, *but under a different notion of claimability than O'Neill's*: one that doesn't require the identification of duty bearers in 'flesh and blood'.

4.4 Response to 2A and 2B

As appealing as 2A and 2B might appear, there are problems with both attempts. Let me begin with 2B.

Response to 2B

I think there are a number of ways to read how exactly 2B is supposed to answer O'Neill's worry, but I think they are all inadequate, no matter which reading one goes for.

First, suppose we follow Ashford in thinking that my right to X is claimable even if it is not precisely clear, or *essentially vague*, who has a duty to do what corresponding to my right to X under a looser understanding of claimability than O'Neill's. My view is that this line of thought still leaves the action-guidingness issue, as O'Neill sees it, unresolved: even if by changing our understanding of claimability we manage to solve the problem of welfare rights being 'non-claimable', we still haven't answered O'Neill's deeper worry that welfare human rights are not action-guiding. A claimable right, under Ashford's understanding of claimability, could still leave us none the wiser when it comes to answering the question of who, *exactly*, has to do what corresponding to a right to X. (Recall Ashford thinks: 'This is genuine claimability, because it articulates a demand each victim can make against all those who participate in the system that harms them and who fail to take enough action toward reforming it...' (Ashford, 2007, p.216)) This point is especially true in cases of welfare human rights violations, when it is almost impossible to conclude who, really, has contributed to the wrong-doing given Ashford's view on the new paradigm of human rights violation. In those cases, Ashford almost deliberately leaves it vague as to who, *really*, bears the corresponding, *positive* duties among those vague collection of responsible parties.

But one might challenge my reading of Ashford's argument and claim that Ashford, far from leaving things vague, has been crystal-clear about *who* these duties bearers are. One can say, when discussing the duty bearers of positive duties that correlate to welfare rights, Ashford refers to the duty bearers as 'whoever is not doing enough to implement their share of the shared duty' or 'individual agents in affluent countries'. Here, she really is referring to *them*, and there is nothing vague about

that. Thus read, Ashford would have successfully answered the question of *who* the duty bearers are corresponding to welfare human rights *even without modifying our conception of claimability*.⁸⁵ However, I doubt this is how Ashford intends for her arguments to be read. I am sceptical because the break-down of the ‘orthodox’ paradigm of human rights violation plays an important role in her view. After the break-down we should realize, Ashford argues, human rights violations rarely occur in such a way that *specific* perpetrators can be mapped up neatly against *specific* victims. The break-down of the old paradigm informs us that, more often than not, there are *no specific* perpetrators in human rights violations that one can point to: the causal stories leading to violations are often so complex that it is very hard—and I take it that it is hard in more than an ‘epistemologically challenging’ way—to point to *specific agents* and designate them as perpetrators. Thus I have taken Ashford to mean that the bearers of all kinds of duties corresponding to human rights will *hence* be vague—the vagueness is the inescapable result of our coming to terms with the problems with the traditional paradigm. It also means phrases like ‘whoever is not doing enough’ and ‘individual agents in affluent countries’ should be seen as essentially vague: not that we need to do a bit more philosophizing to figure out the identity of these agents, but that they *are* vague, given the breakdown of the old paradigm. Yet, as I have argued, O’Neill wouldn’t think this answers the worry concerning action-guidingness.

Finally, I argue it won’t be very helpful either to read Ashford’s argument as one that relies on some notion of ‘collective responsibility’ as a reply to O’Neill. Such an answer, again, still leaves it unclear what *any particular agent* should do. The solution that attempt 2B embodies, even read in this way, is insufficiently specific; even if we accept that it is broadly correct that *some individuals, collectively*, should

⁸⁵ This way of reading Ashford’s argument in fact makes the attempt closer to 2A. What is left to be done is merely to find out who phrases like ‘whoever is not doing enough...’ refer to.

do something to either establish or repair an unjust institution that fails to provide access to basic necessities and violates welfare human rights, this is still insufficient because what *this or that particular agent* should do remains under-specified, not to mention that who the ‘this’ and ‘that’ are supposed to be referring to isn’t very clear, either, except as a collective.⁸⁶ Incidentally, Tasioulas appears to have a similar worry regarding any answer to O’Neill’s worry that appeals to the collective (including the current proposed reading of Ashford). He writes,

... it is unlikely that O’Neill would accept that the meaningful claimability of human rights is secured by identifying a collectively responsible group with a potential membership in the many millions. Instead, *real claimability will require principles apportioning responsibility within the group, specifying exactly who has to do precisely what* by way of compensation, institutional reform, and so on (Tasioulas, 2007, p.98. Emphasis mine).⁸⁷

⁸⁶ Of course, it can be legitimately asked whether any reasonable specification of the obligations corresponding to rights has to be *this* detailed. I will return to this in Section 4.6.

⁸⁷ Incidentally, the ‘collective responsibility’ here Tasioulas refers to is aimed at Thomas Pogge’s suggestion of an institutional understanding of human rights. This might be a good place for me to explain why I do not give Pogge’s account a longer treatment than is customary. In a nutshell, Pogge’s proposal is that if we understand human rights according to what he calls the ‘institutional understanding’, there is no special problem associated with welfare human rights. Under this view, human rights are about the organization of one’s society and having a right to X is to have a claim that one’s society is organized in such a way that one has secure access to X (2008, p.70).

Against whom is this claim? Pogge’s answer is that human rights (both liberty and welfare included) place a duty on citizens within that social order to ‘(re)organize’ (2008, p.70) institutions that fail to ensure secure access to the content of human rights. He writes: ‘Responsibility for a person’s human rights falls on all and only those who participate with this person in the same social system. It is their responsibility, collectively, to structure this system so that all its participants have secure access to the

objects of their human rights' (2008, p.72). Furthermore: 'The normative force of others' human rights for me is that I must not help uphold and impose upon them coercive social institutions under which they do not have secure access to the objects of their human rights. I would be violating this duty if, through my participation, I helped sustain a social order in which such access is not secure, in which blacks are enslaved, women disenfranchised, or servants mistreated, for example' (2008, p.72). This seems admissible as an answer to O'Neill's claimability worry along the line of Attempt 2A or 2B: welfare human rights are, under Pogge's view, claimable against all citizens, *collectively*, who is under the same social institution. That settles O'Neill's *who* question. The *what* question is more complicated. The answer is everyone has to, first, abstain from supporting and participating in such an unjust institution and, secondly, actively take up the responsibility to try to minimize the harm(s) that the institution causes and to reform the institution.

This is where Tasioulas's point about collective responsibility comes in to challenge Pogge's answer—which, I argue, also applies to attempt 2B more generally if 2B is read as a reply relying on the notion of collective responsibility. Indeed, 'collective responsibilities' are Pogge's very own words: 'Human rights are... moral claims on the organization of one's society. However, since citizens are collectively responsible for their society's organization and its resulting human-rights record, human rights ultimately make demands upon (especially the more influential) citizens' (Pogge, 2008, p.70). Now, if 'collective responsibility' is supposed to help us get away from O'Neill's worry, then Tasioulas's criticism does have some bite. Here we ask again, following Tasioulas, what is required of each of these agents to do for their duty to be fulfilled? Tasioulas insists: 'The irresistible upshot seems to be that *the principles apportioning [collective] responsibility will themselves stand in need of institutional shaping*. O'Neill's claimability objection... persists even on [Pogge's] institutional reading of [human rights]: until an appropriate institutional order is in place, the right will not be genuinely claimable' (Tasioulas, 2007, p.98; italics mine). If Tasioulas is right here, O'Neill is unlikely to be satisfied by a Poggean answer.

But a Poggean response to O'Neill might be read in a different way, and this is why I shied away from presenting the above argument plainly in the main text alongside Ashford's as a candidate of attempt 2B, or even under 2A. Insofar as one wants to read a Poggean answer to O'Neill's worry out of an institutional understanding of human rights, there are alternative readings. Jesse Tomalty for example interprets Pogge's possible answer to O'Neill quite differently (2012, pp.104-6). She claims a Poggean solution to the claimability objection would be *simply that human rights, including welfare human rights, would be claimable against institutions*—thus not taking the derivative responsibilities that fall

The same point applies to any answer which tries to tackle O'Neill's claimability worry with reference to some notion of collective responsibility.

Response to 2A

Attempt 2A on the other hand is trickier, because it seems to promise so much but offers very little. On the face of it, 2A seems like the perfect solution to O'Neill's worry. Recall the crux of 2A is that there *is*, after all, a 'correct' way of allocating obligations corresponding to welfare human rights. With enough progress in our deliberation about welfare human rights, we will, sooner or later, come up with an answer concerning how to specify *who* has to do *what* corresponding to a human welfare right. We have even looked at how such allocation might look like (e.g. Wenar's least-cost principle, see fn.842). Thus put, friends of O'Neill should have every reason to be satisfied with this reply.

But attempt 2A is almost too good to be true. The first sceptical point I want to make is that attempt 2A is parasitic upon one huge assumption: that there *is* a correct scheme of allocating obligations corresponding to welfare rights (call this scheme 'S')

on individuals as part of a Poggean answer to O'Neill, contra Tasioulas. Thus rendered, Pogge's reply to O'Neill is quite different. (Tomalty herself goes on to reject her version of a Poggean answer to O'Neill's worry by arguing that Pogge's account makes implausible assumptions about *who* can violate human rights. Pogge's institutional understanding excludes a lot of what ought to be paradigm cases of human rights violations, e.g. honour killings. I think Tomalty has a convincing case there against Pogge but I will not go into that debate.) What I hope to show is that it is contentious what, when pressed, Pogge would say in reply to O'Neill. And if a straightforward reading is absent, spending too much time discussing Pogge's 'attempt' to answer the claimability worry might be too distracting. Finally, note that I also suspect a thorough analysis of what a Poggean reply to O'Neill would look like must go deeper than the current level of discussion and incorporate views from Pogge's lesser cited early paper, 'O'Neill on Rights and Duties' (1992), which I cannot afford to do here. I therefore think it is best if we do not make Pogge a focus in this thesis for fear of distraction.

that is, in a sense, waiting to be ‘found’. I am unsure about the source of this confidence. Even if we grant that S indeed exists (which, depending on one’s wider commitments, might already be a very big ‘if’), it is not clear to me how we might ever be certain about whether we have indeed found S.

That we should not be overconfident about relying on S as a solution could be highlighted by considering how S is only present in our theorising about welfare human rights but not liberty human rights. We can doubt whether, even equipped with S, welfare human rights are claimable in the way we believe in, but a similar kind of scepticism is not admissible in the case of liberty human rights. Even allowing that S indeed exists and can indeed be found through some philosophising, it is a ‘device’ we come across only in making welfare human rights claimable; our standard understanding of liberty human rights requires no such intermediate device: they simply *are* by their nature claimable against everyone. In other words, there is always the ‘open question’, in an almost Moorean way, that one can raise: ‘have we really found S?’ This question, note, is not intelligible when it comes to doubting whether we have correctly identified how liberty human rights are claimable (O’Neill says the holders of duties correlating to liberty human rights are ‘*antecedently identifiable*’ (1996, p.133-4).); there is just no scope for this kind of scepticism, because liberty human rights are fully claimable without ever having to invoke any mention of S. With the ‘open question’ always looming in the background, it is not clear whether we can ever confidently endorse 2A as a reply to O’Neill.

If my pessimism is not entirely unjustified, I think the most one can make of Attempt 2A is a conditional reply to O’Neill—and it comes with a very big ‘if’. *If* S indeed exists and can be found, and *if* we are confident that what we have found is indeed absolutely correct (and that the ‘open question’ has no place at all), then we will indeed have answered O’Neill’s worry. S will inform us of all the unresolved issues about the corresponding duties of welfare human rights: who specifically should, for

example, give up how much of one's wealth to redress human rights violations and should take what steps exactly to make it the case that welfare human rights are not violated (e.g. by acting in what precise way that leads to reforms of institutions, etc.). But until the antecedent of this conditional claim has been satisfied, I remain sceptical.

4.5 Attempt 3 (Welfare human rights are not claimable—but they are, nonetheless, action-guiding)

This final response we are looking at takes a slightly different direction: it asserts that the action-guidingness challenge, contra what I said, can quite easily be met. According to this line, welfare human rights *are* actually unproblematically action-guiding *even granting that they are not claimable*.

It might be worthwhile to compare 3 to 2A and 2B to see how 3 is really different. Recall 2A adopts the line that O'Neill's worry is misguided because welfare human rights are actually claimable, in that the duties corresponding to welfare human rights are really specifiable, given we can be confident in uncovering the correct principles of allocating obligations. 2B, too, says O'Neill's worry is misguided because welfare human rights are claimable, but for a reason that is slightly different: 2B (Ashford's argument) argues that rights are claimable, but we need to revise our understanding of claimability such that specifiability is defined in a looser way than O'Neill seems to understand them. I summarily dismissed both 2A and 2B as not meeting O'Neill's genuine worry because they both render welfare human rights something not sufficiently action-guiding.

Attempt 3, on the other hand, tries to answer O'Neill's worry in a way that doesn't fall prey to my criticism in response to both 2A and 2B (at least 3 is presented as such). Charles Beitz takes just this line. He argues pointedly against O'Neill by contending that welfare human rights are in fact, contra O'Neill, action-guiding. He

writes, by (somewhat liberally, in my view) appealing to Feinberg's view on 'manifesto rights', which we discussed in Section 3, Chapter 1:

Feinberg holds that a "manifesto right" can guide action even if it is not correlated with a duty on any assignable agent to see to the satisfaction of the right to any particular person. It can do so by establishing as a goal of political action for agents appropriately situated the creation of conditions in which it would be possible to satisfy the right, and hence, to assign duties to see to its satisfaction (2009, p.121).

Beitz's reply to O'Neill is that while it is true that welfare human rights, like manifesto rights, are not specific in who bears the duties to do what, they are still action-guiding in a less direct way. These rights are still 'guidance' in a sense that it gives reason for others to 'create' the condition that will make it possible for the human welfare rights to be satisfied. That, Beitz seems to think, rescues human welfare rights from O'Neill's worry.

Response to 3

While I am not entirely certain about Beitz's reading of Feinberg, I don't think we need to dwell on this textual point here. Although I do think there is an issue concerning whether it is fair to read, as Beitz does, that Feinberg really thinks manifesto rights are action-guiding, that discussion will have to be left for another time. More relevant here, I think, is Beitz's own view on the action-guidingness of welfare rights, which is reflected in his interpretation of Feinberg.

I think Beitz's response, despite being the most promising one so far in that it aims particularly at answering the worry about action-guidingness, ultimately fails. Beitz, I submit, slightly misses O'Neill's point. My reaction here is very similar to the

response I offered to attempts 2A and 2B: One might think the answer that Beitz has in mind is just the kind of scenario that O'Neill sketches *before* she introduces her criticism of the human rights discourse. To understand what I mean, imagine the sort of response friends of O'Neill could give at this point of the dialectic: it is all very well to say that 'others' are still guided in their practical reasoning to do certain things leading to the enjoyment or respect of those rights in the future, but, Beitz, *precisely*, who are these others, and who in particular among these others have to do what corresponding to the right? In other words, my diagnosis is that O'Neill would have no trouble at all accommodating everything Beitz says, but she could, I think powerfully, argue that her worry is designed particularly to be about the sort of response Beitz regard as sufficient to answer her worry in the first place. Beitz's reply, again, fails to get to the core of O'Neill's criticism.

Lastly, I want to jump the gun here and flag up one potential complication: for readers who are returning to this passage and hence are already familiar with my subsequent argument, one might wonder whether my eventual 'solution' to the problem is really that different from Beitz's. I think the worry is an understandable one—however, the point I shall go on to make, despite being similar to Beitz's reply in some respects, differs from it in one important regard: unlike Beitz, I do *not* purport to have solved the action-guidingness problem. (See Section 6.1 where I return to this point.)

4.6 Lessons from the attempts

After spending so much time in understanding the currently available (but in my view flawed) replies to O'Neill's worry, where does this leave us? I think what we should take away from the analysis of these attempts to answer O'Neill's worry is that perhaps the most plausible way to bypass O'Neill's worry is to fundamentally question the *Claimability Thesis* in a way that goes deeper than all the attempts. By that, I mean perhaps we want to question the very thought that it is necessary for a

right to exist that the right has to be action-guiding to begin with.

Of course, there is one simple way of defending the attempts above against my criticism. One can refuse to acknowledge that rights have to be action-guiding in the way that O'Neill thinks they have to. In the spirit of attempt 3, perhaps we should all just agree that there are more reasonable standards of action-guidingness, and welfare human rights, whatever their faults are in other aspects, *just are* action-guiding. They might not be action-guiding in a way as strongly as what O'Neill thinks is necessary, but O'Neill is wrong. I think this reply, rather underdeveloped in the literature I should add, is interesting, although I am unsure how far it brings us. It seems likely to me that the debate will merely be a restating of O'Neill's position vs. Attempt 3 and quickly descend into a mud-fight over what 'action-guidingness' means. In what follows I want to propose another response that frees us from the talk of action-guidingness altogether and can therefore hopefully free us from all the challenges to welfare human rights that the worry over action-guidingness brings.

I propose another way of defending welfare human rights. It incorporates a part of Ashford's arguments as we looked at above, but my proposal will look significantly different. I am going to suggest that rather than saying that welfare rights are claimable and allows the action-guidingness issue to come back and haunt us, *we should just accept that rights might not be necessarily action-guiding by their nature*, and question why a right must be action-guiding to begin with: especially since we have, throughout this essay, developed a position that allows us to say something about the point, the function, or the value of rights even if the action-guidingness of these rights becomes doubtful.

5 O'Neill's deepest fear: Head-on

In this section, I want to argue that the way to counter O'Neill's challenge against

welfare human rights should go deeper than the attempts surveyed above. It should say something about the function of rights, because O'Neill's commitment to the *Claimability Thesis* reflects her deeper conviction about what rights are *for*, and the most fundamental way of countering her view is a criticism of her philosophical commitment on this deeper level.

I am going to argue that there is a point to having welfare human rights, after all, that is independent from why O'Neill thinks rights are valuable. And to establish this, I will combine the findings from previous chapters with something from Ashford's argument above.

Recall the dialectic so far is as follows. O'Neill wants to argue that welfare human rights are not rights, because they are not claimable. We have looked at why she attaches such significance to the requirement of claimability: she thinks rights must be claimable because only claimable rights could be action-guiding. Claimability, in other words, is a necessary requirement for a right's existence because it 'tracks' action-guidingness. We have looked at some attempts to show that O'Neill is wrong, but I have argued that they are inadequate because they fail to tackle the very core of O'Neill's complaint: that rights have to be action-guiding, and welfare human rights, however you describe them, are just by their nature not action-guiding in the relevant way. With the importance of this deeper level commitment made clear, we can reformulate her argument as follows:

P1 All rights must be action-guiding (in the strong sense, as we discussed previously).

P2 A right can be action-guiding only if it is claimable.

P3 Welfare human rights are not claimable.

C Welfare human rights are not rights.

My response to O'Neill here is *that it is doubtful whether we have to commit ourselves to the requirement of action-guidingness (P1)*. It might well be true that a lot of rights are indeed action-guiding, but it is not clear to me why we want to hold that *all rights must* be action-guiding, at least in the stronger sense.⁸⁸

The answer I am going to offer is a natural extension of Chapter 4: rights don't only do one thing; **one of the other things that they do is to enable the right holder to make claims or demands against others about the content of the right—and this can be done in a way that is not action-guiding in O'Neill's sense.** If this is true, P1 is questionable. This then is the basic structure of my answer to O'Neill's worry. The point is ultimately to reject her necessary condition for the existence of rights by appealing to the demand-function of rights which I have developed in this thesis. What remains is to show that welfare human rights *do* in fact have that function, and that the demand-function of rights need not be action-guiding.⁸⁹

⁸⁸ I am going to leave aside one question for now: how this discussion relates to the interest and will theory discussion. The question I am having in mind is: if O'Neill indeed holds something like P1 as a necessary condition for a right's existence, doesn't it make her actually someone who should have been lumped together with the will and interest theory as yet another conflicting (in Wenar's words) monistic account concerning the function of rights?

But given the two debates (i.e. the will and interest theory debate on the one hand and the debate over claimability of rights and human rights on the other) are, by and large, treated separately I will not try to complicate things by merging them here. (An exception is perhaps Tasioulas (2007), who attempted a rejection of O'Neill's claimability requirement based on an interest theory of rights.) I do however recognise that there are potential connections and think it is worth flagging up.

⁸⁹ Note that I do not seek to rule out that rights and welfare human rights can be 'action-guiding', under some other conceptions of action-guidingness (say, action-guidingness*), if we look at what the

Finally, I want to highlight why I am not taking some other strategies that one might consider to be more straightforward.

First, one might suggest we had already shown that P1 is wrong by following Wenar in thinking there is no one single thing that all rights must do. We do not really have to show whether welfare human rights can perform the demand-function in order to show P1 is wrong.

But this argument is too simplistic, for it admits of an easy rebuttal: friends of O'Neill might say of human rights that perhaps *they alone* must be claimable and action-guiding, because it is not clear what point there is to having *human* rights if they are not claimable and action-guiding. They might be happy to concede that other rights could do some other functions, but all human rights must be claimable and action-guiding. In other words, they might hold:

P1* All *human* rights must be action-guiding (in the strong sense, as we discussed previously).

demand-function is. What I primarily want to show is that enabling rights-backed, authorized demands is a function that rights have in a non-action-guiding way according to O'Neill's conception of action-guidingness. I am hence happy to accept that if a critic so wishes, he can of course argue that the demand-function is, after all, action-guiding*.

But even by allowing that, it remains to be the case that the force of my argument relies on rights and welfare human rights having the demand-function, and that this function can be understood in a way that does not conform to O'Neill's requirement of action-guidingness. Beyond this point, I wish to remain silent on whether I think there are some more apt standards of action-guidingness in moral philosophy or what such a standard should look like. To answer these questions, and to evaluate my proposal of the demand-function in that light, are additional projects that my readers can pursue if they so wish.

P2* *Human* rights can be action-guiding only if it is claimable.

P3 Welfare human rights are not claimable.

C* Welfare human rights are not *human* rights.

This suggests that we need a way to reject not only P1 but also P1*. I think if we can show that welfare human rights can indeed perform the demand-function independently of being action-guiding, this not only challenges P1, but P1*, too.⁹⁰

Second, and this is a suggestion that has already been touched on, one might be tempted to think it is possible to defend the *Claimability Thesis* by debunking it from action-guidingness (in a way that is similar to attempt 2B). For example, one might wish to defend a version of the *Claimability Thesis* that holds that all rights must be against some collection of agents or institutions.

But this runs the risk of being a straw-man response: O'Neill is not likely to be happy with that kind of *Claimability Thesis* anyway, for her ultimate concern is action-guidingness. Defending this weakened version (without action-guidingness in the strong sense) ultimately pleases no one.

6 The demand-function of welfare human rights

The main aim of this section is to say more to support the claim that 'human welfare

⁹⁰ Note how this slightly modified position will still be consistent with rights' function being non-monistic : one can, perhaps, be silent on the function of other rights *in general* but focus specifically on human rights—maybe, one can concede, other rights do other things so there is no one thing that all rights do and Wenar is right about this, but, *human rights* at least must be claimable. This is why relying on Wenar's anti-monistic thesis alone would have been too weak a criticism of O'Neill's argument.

rights can indeed serve the function of allowing their holders to make normatively important claims or demands on others regarding their rights'. That is, I want to defend the claim that it is unproblematic for welfare human rights to serve the demand-function. The further support offered here is important because even if one accepts, as I have been doing, Feinberg's insight that rights do perform the demand-function *in general*, one might still argue the nature of welfare human rights poses a specific challenge for them to perform the demand-function.

To see why this might be so, imagine a very simple case of contractual rights: let's say A and B entered a legitimate contract over some commercial transactions and A now has a right that B delivers a specified amount of goods to A once A has made a specified payment to B. Suppose A has now paid. Now A, we might plainly say, can make a claim or demand against B in a normatively significant way; it is A's contractual right's *function* here that it enables A to make a claim or demand about the delivery of the goods in a normatively significant way. So far so clear.

But a similar structure is absent in the case of welfare human rights—which precisely is the observation that O'Neill grounds her original critique on. In the case of welfare human rights, the question of *who* these demands and claims are directed to is a lot more puzzling than in the simple cases where the answer is quite obvious. Suppose we accept that there are welfare human rights, and there is someone invoking her right so as to make a claim about her appalling living standard, for example about the lack of access to clean water. There is, of course, a sense that she can just utter the following statement: 'Give me some water, please.' Of course she *can* in a very weak sense of the word *can*—in our imaginary world, she just did. But there is also a sense in which we are not quite sure how to understand this utterance. Is this really a demand? If so, who is this demand against? There is, as it were, no analogous person B in this picture for us to easily lodge the demand with. So here is the first question I want to explore: Can we actually make sense of the

idea that welfare human rights can enable their holders to make rights-backed, authorized demands? That is the first challenge. I think we most certainly can make sense of this idea, and making a demand—rights-backed or not—against a vague collection of agents is not as strange as it might first appear.

Second, it is not clear whether our previous analysis of robust reason-giving is plausible any more when it comes to demands backed by welfare human rights. Even assuming that Challenge 1 can be met, i.e. it is in no way problematic that a demand can be made against a collection of agents whose identity is not specified, how can such a collection of agents come to be robustly given a reason to do things? Does the robust reason-giving model still work when the identity of the parties on the receiving side of the reason is not specified? I think it still does, and in the next section I will sketch a way according to which it can.

6.1 Challenge 1 (Demands—against whom? about what?)

The challenge here, recall, is that given the character of welfare human rights, who are these 'others' to whom the claims and demands are directed? If we take O'Neill's worry seriously, the problem with welfare human rights is that their duty bearers are left unspecified, and there is just no clear way to say who has to do what regarding any welfare human right: it might be quite natural then to think that this simply results in it being impossible to say anything about who those rights-backed demands are directed against in the case of welfare human rights, and consequently it is implausible for welfare human rights to have the demand-function.

But I don't think my prospect is that grim. The crux of the answer we can give has already been explored. Recall our earlier discussion of the 'openness' of demands (Section 8 & 9, Chapter 2). We have established that addressees of demands do not necessarily have to be specified in order for someone to have genuinely made a valid

demand.⁹¹ In the case of demands being backed by welfare human rights, I argue one can understand the identity of the addressees of the demands likewise, as an instance this special sort of demands. We can for example see the addressees of welfare-human-rights-backed-demands as 'humanity', 'the west', or 'the rich'—or something equally unspecific. It is by no means unpopular in the human rights literature to hold a vague collection of agents to be the bearers of duties corresponding to human rights in precisely this way. In this thesis, I am not going to endorse any particular solution to this problem (i.e. I am not going to answer the question 'is it the West? Or is it 'Humanity'?)—I think fixing the addressees of these demands is a task human rights theorists should take up when defending a substantive theory of human rights. But whatever one picks as the addressees, as long as they are understood as a vague collection of agents, my arguments concerning the openness of at least some types of demands and the demand-function of welfare human rights offer support.

Note too that on top of the identity of the addressees, the content of these demands can also be left open, in that a demand about basic subsistence provisions can simply take the form of 'give me some X'—the demand itself does not have to specify what, exactly, has to be done for the provision or deliverance of X.

I take my contribution to be a defence of a 'family' of accounts of human rights, according to which welfare human rights enable the right holder to make demands against some parties which are less than fully specified, and the content of the demand can be as vague as, say, the provision of the content of the right.

⁹¹ The 'validity' of a demand, recall, is not a normative notion in that saying a demand is 'valid' doesn't mean it is sanctioned by morality or anything like that—it just means that it is, genuinely, a demand; in this sense, a thief or a robber can issue a valid demand to their victims.

Finally, now we are in a better position to make clear how my proposal is different from Beitz's reply to O'Neill (Cf. Section 4.5). What I do not claim to have achieved here, *contra* Beitz, is that my reply amounts to an answer to O'Neill's action-guidingness worry. Unlike Beitz, the strategy I am taking here to defend welfare human rights is not to show how, actually, they are action-guiding and that O'Neill has been wrong in thinking that they are not. I am defending them by highlighting something *else* that they do—an important philosophical difference.

6.2 A modified-Ashford-like reply: a 'case study'

More specifically, let us consider one such member of this family of accounts. Here I draw inspiration from Ashford's work which we discussed earlier. Previously, we have already looked at how Ashford thinks the way to answer O'Neill's worry is that the account of claimability should be suitably modified, such that welfare human rights *are claimable* without being specific in terms of their corresponding duties. I then rejected that on the ground that it doesn't solve O'Neill's deeper worry about action-guidingness.

Yet, I want to claim here, not all is lost: there is still something very important, I think, that Ashford's discussion captures. It did raise the important thought that welfare human rights *might indeed be* claimable under some other description: that they could be claimable in a more general sense, in that they (in Ashford's words) 'articulate a demand' against those who are responsible.

I think it is possible for us to draw the following suggestion out of Ashford's reasoning: welfare human rights enable their holders to make claims against some essentially vague collection of agents.

To reiterate a point already discussed in Section 4.4, Ashford holds that in many cases of human rights violations, it is not clear who the perpetrators of human rights

violations are. On that point, she writes: '... responsibility for human rights violations may be very broadly shared, and need not lie solely or at all with agents who can be identified as perpetrators' (2007, p.198). She sees this as what necessitates a shift in our paradigm in thinking about human rights violation.

But the difficulty in identifying perpetrators does not mean Ashford thinks claims (or as I would call them, rights-backed, authorized demands) cannot be made against them, for she also declares that the holders of welfare human rights *can* make claims about their rights. In the case of liberty human rights, the claims are directed against 'all those who participate in the system that harms them and who fail to take enough action toward reforming it' (2007, p.216). And in the case of welfare human rights, even when just institutions doing the allocation and specification work are missing, Ashford thinks these claims are directed against '... every agent who is not doing enough to implement their share of the shared duty' (2007, p.217). I have already suggested that it is most plausible to read these notations such as 'every agent who is not doing enough' and 'all those who are failing...' in an essentially vague and unspecific way. (See Section 4.4.)

It is thus possible for us to see the combination of these claims as an endorsement from Ashford that it really isn't that absurd to think human rights, including welfare human rights, enable us to make claims on agents *whose identity remains essentially vague*. Such is the status of 'those who are responsible'—they are by no means a concrete collection of agents. Their precise identity is left deliberately vague. But that fact poses no difficulties in terms of establishing that human-rights-backed, authorized demands *can* be made against *them*.

This position is helpful for me. Recall what I want to defend is that a holder of a welfare human right is enabled by the right to make normatively significant demands on others about her right. And the demand, I argued, can be against some

vague collection of agents—'the west' or 'humanity', for example. Challenge 1 comes in at this point, asking: but can you really demand things against a vague collection of agents? I insist that there is nothing wrong with saying 'yes' here, because, as we have established in Chapter 2, at least some demands can be *open* in their character. Here is when Ashford's point becomes interesting in the dialectic. I propose that if we think deeper about Ashford's argument, she has actually invoked something similar to what I want to defend. According to my reading of her thoughts, in cases concerning *both* negative and positive rights, that the responsible agents are 'those that are not doing enough, often those in the affluent West' is one possible form which my answer can take. And crucially she is of the belief that welfare human rights thus construed articulate a demand against some vague collection of agents. While I concede it is true that saying these rights 'articulate' some demands against some vague collection of agents isn't identical to what I want to defend, let me highlight the more fundamental point in my favour: that these demands concerning welfare rights *can be articulated against some vague collection of agents*. This, stripped to the bone, is the important assumption in Ashford's thinking, and I think this speaks in favour of my defence against Challenge 1.

All in all, after studying this modified answer from Ashford's earlier discussion, we get a somewhat radical yet natural conclusion: there is nothing problematic (or invalid) about a demand that is made against an unspecific collection of agents, for example 'those who are responsible', the identity of whom is difficult or even impossible to specify, given Ashford's argument. This, I submit, allows us to meet Challenge 1: the vagueness in the specification of the identity of the addressees of the demands does *not* necessarily pose a problem for the claim that welfare human rights serve the purpose of enabling the right holders to make claims or demands about the content of their rights in a way that is normatively significant.

Finally, before we move on, in order to clear any doubts concerning the work

Ashford's argument is doing in the dialectic, I want to make a clarificatory point. I am more interested in, ultimately, defending the general framework of an argument against O'Neill, rather than endorsing substantive positions in the philosophical debate of human rights, like that of Ashford's, for instance. What I mean is that while I am keen to show that, in principle, welfare human rights can perform the demand-function and enable right holders to make claims against unspecified others, I am less interested in specifying who, substantively, those unspecified others are. Thus, by bringing in Ashford's earlier discussion, I am not endorsing this as my view regarding who I think those claims and demands ought to be against. While she says those who have responsibility concerning the violations of welfare human rights ought to be 'individual agents in the affluent countries' sounds indeed quite plausible to me, I however am not putting this forward as the only plausible answer. I have merely used her reasoning to suggest that, while it might be an unusual case, there is nothing improbable about the thought that a right can back up demands a right holder makes when the identity of those who the demands are against remains essentially 'vague'. My line of reasoning is thus, in theory, compatible with a different answer to Ashford's that picks out some other set or sets of agents to be those who these claims and demands should be against, even if the identity of these agents remains vague. But I am not going to explore what those answers might look like here.

6.3 Challenge 2 (Reason-giving—how?)

The second challenge I want to consider is that it seems somewhat odd to suggest that one can give reasons, let alone robustly doing so as discussed earlier, to a vague, unspecified collection of agents. The hypothetical challenger here takes the following reasoning: while I may concede that rights do, sometimes at least, fulfill the function of enabling the right holder to make normatively significant demands or claims against others, when it comes to cases like welfare human rights where

characteristically the right holder makes demands backed up by the right against some unspecified collection of agents, I can't make sense of the normative implication of this act—how can we think of these agents as being given a reason to act robustly in virtue of the demand, especially they are a collection that is non-organized and uncoordinated? And, crucially, if this doesn't work, how can the demand-function of rights be understood as a reply against O'Neill's criticism we saw earlier in this chapter?

In this section, I want to, first, explain more clearly how the challenge comes about and, second, make it explicit how this has implications on my position with regards to O'Neill's criticism.

6.3.1

Thus, to begin with, let us try to better understand the challenge and why, exactly, some might resist the thought that demands backed by welfare human rights can be reason-giving in a robust way.

First, let me flesh out why welfare human rights might pose a particular problem for the explanation of the normative significance of rights-backed demands via the robust-reason giving model. As Enoch himself explains, there is a conceptual constraint on who robust reasons can be addressed to, although he doesn't fully develop this line of thought. He asks rhetorically before answering his own question in an almost dismissive way,

... is there any... restriction on who can be robustly given a reason? Well, arguably, only persons can be given reasons, but for very general reasons that have nothing to do with our topic here. Perhaps, for instance, only persons (or only agents) can have reasons. And of course, you can't give someone a reason who can't have a reason. If so, only persons (or agents)

can be given reasons, but this can't teach us anything interesting about the giving of reasons (Enoch, 2011, p.7).

After this, he goes on to say that the 'ability to respond to reasons' seems to be an implicit assumption one must make of the receiver of the reason-giving. For example, for me to sincerely give you a reason robustly to give me a hand in my job application, I need to at the very least assume that you 'can respond' to the reason I give you.

But so far, one might be inclined to think nothing seems that problematic: for example, it doesn't seem unnatural or absurd to say we assume that 'humanity' or some equally vague collection of agents could have the 'ability to respond' to reasons. Imagine, for example, a sci-fi movie in which the President of the Earth of some inter- (or super-) national organization, presumably with more effective authority than the current head of the United Nations, is addressing the whole of humanity. 'We have to fight back,' he might say, referring to some security threat of an alien nature. 'We, humanity, must fight for our survival.' There, speaking of humanity as having various kinds of abilities to 'fight back', perhaps even including (implicitly) the abilities to respond to reasons, doesn't seem that far-fetched. It is after all natural to think that in assuming humanity to have the ability to 'fight back', all sorts of more fundamental abilities must be assumed by default. But this line of reply actually fails to get to the bottom of the challenge, because the issue under discussion is not about whether some vague collection of agents like 'humanity' can be given reasons, *period*. The actual problem which Challenge 2 embodies is that it seems unlikely a loose collection of agents like 'humanity' can be *robustly* given reasons. Recall the distinctions among different kinds of reason-giving we have covered in Chapter 2: following Enoch, we have identified there are at least three kinds of reason-givings, including epistemic reason-giving, merely triggering reason-giving, and robust reason-giving. *While the story of the President of the Earth*

might make it plausible for us to accept that a loose collection of agents might be given reasons in the first two ways, the latter remains problematic. That the last class of reason-giving is singled out to be peculiarly problematic comes down to the complicated set of abilities involved in being addressed reasons robustly.⁹²

To see exactly what's going on, imagine I am purporting to give 'the West' a *practical* reason to do X. As we discussed in Section 2, Chapter 2, one of the conditions that have to be met for my reason-giving to be robust is that I have to intend 'the West' to recognise my intention. Can 'the West' recognise anything? Even if they do, can they recognise 'intentions'? Or think about the success condition for the attempted robust reason-giving to be successful. One of the conditions is that 'the West' would have to allow my intentions to appropriately influence its own (the west's) practical reasoning. Given it is a collection of agents that is vague in its constitution and lacking in decision-making mechanism, is that at all possible? These then are the core set of questions we have to answer in order to meet Challenge 2.

⁹² While nothing much, at the end, hinges on this, I think it might be helpful for me to spell out briefly what the President giving reasons to the world either epistemically or in a merely triggering way would look like. For the President to give humanity an epistemic reason for action, we might think of the President as doing something to highlight a reason humanity already has regarding this alien invasion which is independent of the act of highlighting itself. For example, if one thinks that humanity, vaguely put, has a reason to care about its own existence anyway, then the President can 'remind' them of this preexisting reason by highlighting that in his speech. Alternatively, the President can also give humanity a reason in a merely triggering way. He can for example motivate or encourage humanity by merely changing some non-normative facts: e.g. by making military involvement more financially attractive or by making non-involvement in military actions against aliens a criminal offence. He would have given humanity reasons to act, but he would have done so in a merely triggering sense. The point of the whole story is that these instances sound less obscure; we can make sense of how humanity, as a vague collection of agents, can be given reasons in these ways. But when it comes to robust reason-giving, it becomes rather strange.

6.3.2

Now we come to the second aim of this section, i.e. to explain why there is much at stake in meeting this challenge. It is essential for me to tease out the importance of this challenge so we don't lose sight of the overall aim. This challenge is important insofar as I want to say something about O'Neill's criticism against welfare human rights in the following way. Recall that earlier I have said I think O'Neill's criticism of welfare human rights is misguided. According to the best of my understanding, she thinks given welfare human rights do not have corresponding duty bearers, and that the content of those duties is necessarily left obscured, it is a bitter mockery to the poor and needy to claim that they have a human right to X. I have sketched a response to this, which suggests that it seems to me there are functions of human rights that O'Neill could have paid more attention to, which should render her claim that welfare human rights are mocking the poor somewhat overstated. In order to substantiate my claim, I have to show that welfare human rights do indeed have what I have called the demand-function, the explication of which requires us to employ the model of robust reason-giving that we have explored. But in spelling out how we can make sense of such a function via this model in the case of welfare human rights, we run into two problems particular to this kind of rights-backed demands. One of them, 'the question of whom', has already been dealt with in Section 6.1 and 6.2. What remains is 'the question of how', which this section and the next focus on. In other words, the importance of my being able to meet this challenge is that in order for me to have a meaningful response to O'Neill, I have to show that, in fact, there *are* things that human welfare rights can do, despite what she claims about the lack of action-guidingness of these rights, and that this function of welfare human rights can indeed be explained through the same model of robust reason-giving as we have discussed before in Chapter 2. I need to explain how it is possible that the demand a right holder makes, backed by her welfare human rights, can be reason-giving in a robust way.

The stake is high here, because it seems we need to make sense of the very suggestion that a right holder can make a demand against a vague, non-organized collection of agents as being normatively important: *that* has to be shown precisely to counter O'Neill's criticism about, in a sense, the pointlessness of welfare human rights. This will then allow me to conclude that given welfare human rights *can* enable their holders to make demands that are normatively significant, it is therefore (contra O'Neill) not true that they are superfluous, or empty, or, even, a mere mockery to those in need. In other words, what I need to show is that welfare human rights can, in some way, *empower* their holders.

6.4 A reply to Challenge 2

How a loose collection of agents can possibly be robustly given practical reasons?

It is worth reiterating that the challenge we are facing now is a quite specific one. It is directed at whether a particular kind of agents (i.e. a loose or vague collection of agents that lacks a decision-making mechanism) can be given practical reasons in a particular way (i.e. in an robust way).

To recap, the reasoning that led to this challenge roughly goes as follows. First, in order for A to robustly give B a practical reason, it would appear B has to possess certain abilities and power of recognition as a prerequisite; this is in turn explained by the very nature of robust reason-giving we have been exploring, which gives prominence to some complex intentional relations among A, B, and an action, φ . Thus the challenge highlights the fact that in the case of welfare human rights, consistent with what I have outlined in Section 6.2, the demands made by holders of welfare human rights are typically made against a vague collection of agents like 'the West' or 'the affluent' and hence are problematic. Crucially, since we have already granted that to give a practical reason to, say, the West either epistemically or in a merely-triggering manner is unproblematic, therefore, we should bear in mind that

the crux of the challenge rests on the possibility of *robustly* giving practical reason to a loose or vague collection of agents which is by its nature non-organized. Because without this, we will not be armed with anything to say to O'Neill that there *is* something about welfare human rights that empowers, such that it is not a mockery to those in need to insist upon the existence of their rights. How is that possible?

6.4.1 Rejecting the group agent solution

First, I want to reject one solution which might appeal to some from the outset. Now there might be those who think there is actually nothing unusual or peculiar for 'the West' or 'humanity' or something equally vague and loosely defined to possess the aforementioned abilities because robust reason-giving does not become impossible simply because I find the attribution of these abilities to for instance 'the west' to be problematic: these vague collection of agents, the argument goes, should be construed in a way far more concretely, and collective-agent-like, than I have been assuming. Robust reason-giving to a collection of agents is entirely possible—most natural even—if the collection is treated as a *group agent*. If so, then indeed there is nothing mysterious about their possession of these abilities—for despite their metaphysical composition, they are, by definition, *agents*, and these abilities seem paradigmatic if not essential to agents under any plausible account of agency. Ergo, I was wrong on this point: robust reason-giving, as a model explaining the normative significance of demands backed by rights, aptly applies to demands backed by *welfare human rights*, even when they are made against 'the West' or other similarly loosely made up collection of agents, assuming that we understand them as group agents. Hence, Challenge 2 does not hold, and I have a ready-made answer to O'Neill's worry.

I do think there is some initial plausibility to this suggestion. If we think this group agent route is plausible, then we are likely to endorse the following position:

We accept that 'group agency' is a good way to make sense of what it is to make demands against a vague collection of agents and, hence, demands backed by welfare human rights are capable of being robust reason-giving.

But ultimately I find this solution lacking, despite the fact that it is a very neat solution to our problem. I am skeptical about how plausible it is after all to have vague collections of agents like 'the west' or 'humanity' construed as 'group agents'. The literature on agency, and group agency in particular, appears to be on my side, especially since we have accepted that the collection in question would most likely be one that does *not* have a decision-making mechanism in place. However diverse the opinion on what constitutes (or even whether there is) group agency, it seems mostly it is agreed that there is a fundamental distinction between a mere collection of agents and group agents—precisely determined by the presence or absence of such decision-making mechanism. It is therefore, I think, a difficult up-hill battle to try to construe something as vague and uncoordinated as 'the West' or 'humanity' as a group agent. It is, of course, not conceptually impossible; but as an empirical fact, it is I think extremely counter-intuitive to argue that they are anything more than a loose collection of agents with not clearly defined boundaries of inclusion or exclusion.⁹³

But does this automatically lead us to the dismal conclusion that we simply can't make sense of how one can robustly give reasons to a vague collection of agents? It will be a dismal conclusion because, recall, we will then not have anything to say about why O'Neill is wrong, and that welfare human rights are in fact empowering in some sense that she has missed. Fortunately, I think there is another option. It could free us from trying to make the demands made against 'the West' demands that are against some sort of group agent, while maintaining the sense that these demands

⁹³ For further discussions of the debate over what constitutes group agency, see List and Pettit (2011).

can still be robustly reason-giving, if they are backed up and authorized by rights. The suggestion is as follows:

Could we not perhaps rework, or at least reinterpret, Enoch's own account of robust reason-giving, such that in order to be given reasons robustly, the party in question does *not have to be one concrete agent*? Maybe, after all, the President of the Earth story tells us something interesting. Perhaps it shows our intuition that 'humanity' or something equally vague *can indeed be given reasons, and in a robust way, too*. This option allows us to say something about how these welfare-human-rights-backed demands can be robustly reason-giving, without having to invoke the problematic notion of group agency.

This solution is, as yet, very schematic. The next subsection will give this more substance and plausibility.

6.4.2 Reinterpreting our understanding of being robustly given a reason to act

It should be clear by now that one plausible way to make the demands backed by welfare human rights robustly reason-giving is to see whether it is possible to revise or at least reinterpret the account of robust reason-giving that we inherit from Enoch; if there is something that is inherent in his characterization of robust reason-giving such that these demands, which are typically made against a vague collection of agents, cannot be reason-giving robustly, then it should be open to us to see what modifications or reinterpretation we can make (and to consider whether they are reasonable, of course) to make the account of robust reason-giving fit for purpose here.

Recall the crucial feature in Enoch's account of robust reason-giving which was

problematic for us in the first place. It is the supposition that, were A to give B a reason in a robust way to φ , B must have certain abilities that we found problematic to attribute to a vague collection of agents.

There are two major kinds of abilities being assumed that B has to possess for A to successfully give B a reason to act in a robust way: a) the ability to recognize intentions, and b) the ability to act on some reasons for actions.⁹⁴ Is there a way to understand a loose collection of agents as possessing these abilities?

I think there is. One way to do that is to collapse our understanding of the collection of agents (the West, for example) back into individuals, and therefore the solution to Challenge 2 is simply that despite the fact that the demands are made against this loose collection of agents, they do not robustly give reasons to others to act *as a collection* of agents. At the end, given we are assuming that the West, or humanity, or some such equally loose collection of agents are *not* group agents (we have rejected that reading previously), they must therefore be understood as a collection of *individuals*. Thus, perhaps we should understand the robust giving of reason to the West as giving a reason robustly to act *to each of those who are referred to by 'the West'*. It is of course true that there are some uncertainties and vagueness concerning who they precisely are, just as when we refer to, say, 'the affluent' in the West, there could be considerable disagreement over who exactly count as living an affluent life. But this complication shouldn't be taken as an obstacle that bars us from thinking that 'the West', whoever is included in that collection, can have reasons, individually, to act as a result of being addressed to by a demander in a somewhat uncertain manner.

This way of thinking also adequately deals with with the concerns raised in a) and b):

⁹⁴ They correspond to the definition of robust reason-giving we looked at in Section 2, Chapter 2.

once we have collapsed, say, the West back to individual agents when we think about the giving of reasons, it seems unproblematic for them to have the ability to recognize the intention of the maker of rights-backed, authorized demands, and the ability to take something as a reason for one's action.

This way of understanding how robust reason-giving works when a rights-backed, authorized demand is made against a vague collection of agents has interesting implications. On the one hand, it is still *the vague collection of agents* who now have a reason to do certain things as a result of having a rights-backed, authorized demand being addressed to 'them'. On the other, however, once we start looking deeper into who, *exactly*, has a reason to act, we think in terms of the individuals who make up those collections. Thus, for example, when I am making a demand against 'the rich' in my community to make more contributions to respect my rights, I am indeed making a demand against an as yet under-specified, loosely construed 'them'; yet when we start thinking about the feature of robust reason-giving that explains what is going on normatively about this demand which I just make, we have to think in terms of the individual agents, whoever is included in the collection we call 'the rich', being given reasons to act. This solution undeniably contains some uncertainties: e.g. we still haven't fully specified which precise individuals count as being included in those vague collections; but this uncertainty is precisely why the idea of the demand being addressed to a vague collection of agents is still very important to my argument—we need this step, this idea that the demand is being addressed to an essentially vague collection of agents, in our argument to allow the demands to be made in cases where the precise identity of the addressees of these demands remains unresolved. But what is also true of my argument is that this uncertainty ceases to pose any particular challenge for us to understand how such demands can be robustly reason-giving to this loosely construed 'them'. Because barring the problem of the precise identity of the addressees, the giving of reasons to them should be understood as the giving of reasons to *whichever individuals* that

make up the collection.

6.4.3 Some complications

Crucially, let us now go back and see to what extent this allows me to answer O'Neill's worry. Does my answer actually allow us to say anything about how the welfare-rights, in some sense, *empower* their holders?

One might think I haven't achieved that yet, and can put the worry in the following way: It is all very well for you to say that, in robustly giving the vague collection of agents reasons to do certain things, we have to think in terms of the individuals who make up the collection. But is that answer sophisticated enough? Firstly, how, for example, can we begin to understand the content of those reasons being given, given there still remains an issue concerning the 'membership' of these collections? And, secondly, since we are talking about individuals who make up a collection in a non-organized, uncoordinated way, can they actually be *instructed* in any way by the demand being given to them? And if not, what can these rights-backed demands achieve, so much so that we can argue from this that O'Neill has missed something empowering about these welfare human rights in her fierce criticism?

I think we can meet these criticisms. That is to say, I think we can indeed defend the normative importance of the welfare-human-rights-backed demands, and to offer a story about how they can 'empower' their holders in a sense that challenges O'Neill's assertion which we have looked at. And, crucially, this is to be achieved while conceding that, strictly speaking, O'Neill might very well be correct in attacking welfare human rights as being non-action-guiding.

Let me illustrate my point through a case where I think there are interesting parallels. Imagine there is a fire, and Bob is trapped in his flat. Bob sees that there are bystanders outside the flat from his second floor window. He makes a demand

against ‘them’, saying, ‘save me!’⁹⁵ Suppose further, not implausibly, that Bob has a right to be saved from a fire, or to safety in general.

This is an interesting example, because I think this case mirrors the structure of the case of welfare-human-rights-backed-demands. Both are scenarios in which the (rights-backed) demands are addressed to a loose collection of agents where the ‘membership’ of the collection is less than definite. Additionally, who exactly has been addressed, and what exactly is required of *each* individual bystander to do in response to the demand made by Bob are up for grabs, given they have no predetermined scheme of coordination. But it seems to me undeniable that both are cases where I think it is quite clear that a reason *has* been given in a robust way, despite the fact that the content of those reasons is similarly vague. And yet, and this is crucial, it seems absurd to think that *because of this unclarity*, Bob hasn’t done anything normatively, that he is merely performing an empty gesture in crying for help and demanding the bystanders to save him. (Note that nothing about the force of this example depends on there being an institutional backdrop to coordinate the rescue; it might very well be true that Bob lives in a society where there is a fire service department. But I think the intuition behind this rings true even if Bob lives in a society where there isn’t such service.)

Of course, we should all accept that Bob hasn’t quite told the bystanders what they should do *individually*; it might turn out that, actually, three bystanders ought to break the door, one ought to call the police and the other ought to go find a mattress so Bob can jump from his window, and so on. Alternatively, it might turn out that Bob is addressing only those on his side of the pavement, and if everyone from the neighbourhood comes over it will not only be redundant, Bob’s prospect of being saved might even be hurt, etc. But these very detailed, precise—what one might

⁹⁵ [say something about how this is taken from Held]

following O'Neill in calling 'action-guiding'—demands are not what Bob issued. Instead, Bob said, imprecisely, loosely but very plainly and naturally, 'save me!' And it seems to me very strange to think that Bob has given *nothing* of normative significance, simply because he hadn't laid out the detailed plan to get him back to safety and have worked that solution into the content of his plea. What this shows, I think, is that the case of Bob gives us one interesting and strong intuition: actually, we are quite open and receptive to the suggestion that a loose collection of agents *can be robustly given reasons to act* despite the fact that the content of the reasons being given is unclear, and that this is true even if who among those individuals has to do what precisely is not definitely clear in the absence of a scheme of coordination. Because if we do not accept this, there is just no way for us to understand what is going on normatively when Bob tells the bystanders to save him. By the same token, I think it should not be a major philosophical challenge for us to accept that the vagueness concerning the content of reasons that are given by welfare-human-rights-backed demands is imprecise. The imprecision is not so strong that it makes the very idea of a reason being given in these cases untenable.

Put differently, had Bob given the bystanders some 'guidance' as to what they ought to do? Well, in a sense, of course, he just told them to 'save him'. O'Neill is unlikely to be impressed here; she would probably claim that whatever Bob has just issued, it isn't 'action-guiding' enough: because we still haven't been told what bystander A, B, C...N *each* has to do. When A, B, C... N each wants to answer what we have called the 'practical question' (i.e., what ought 'I' do), Bob's demand does not fully guide them. The overall aim of 'saving Bob' is void of content if the individuals are not coordinated. This I take to be the point that O'Neill is making in the case of welfare human rights. Nevertheless, contra what O'Neill insists, this is precisely the view I want to challenge. It seems to me extremely odd to deny that Bob's demand to the bystanders at least has *some* content: well, plainly, it was a demand that the bystanders save him. It is of course true that this doesn't answer each of their

practical question from their own subjective, individual standpoint. It, too, of course does not solve the 'coordination problem' the bystanders face, should there be one. But all these, I think, are besides the point when we want to know whether Bob has been in a position to issue a demand with a particular normative force that the bystanders save him. I think there is no way to deny that Bob has. And the content of that demand? Plainly, that they save him.

This neatly brings me to directly address the issue of action-guidingness. Earlier in Section 5, I said my defence of welfare human rights is one that does *not* try to make welfare human rights action-guiding, thereby sidestepping O'Neill's challenge. I think it should be obvious by now why that is so. With our considerations discussed immediately above concerning both i) the uncertainties of the precise addressee of this kind of demands (i.e. the fact that the demand-function of right in cases of welfare human rights does not typically tell us much about who, exactly, has been given a reason in a robust way to do what on an individual level as a result of a welfare-human-rights-backed, authorized demands being made) and ii) the vagueness in content of the demand itself (i.e. the fact that these demands are often made in a way that does not contain a full, detailed description of the action required for the demand to be met), I think it is safe to conclude that my proposed defence of welfare human rights does not purport to be an account of welfare human rights which is 'action-guiding', if by that we mean answering the 'practical question' of what I, or any given individual, ought to do with a high level of precision.

It is possible that, as I have hinted at in Section 5, one might be tempted to argue that what I have presented in this section effectively amounts to a defence of the demand-function of welfare rights being actually action-guiding 'in a looser sense'; for instance, one might choose to hold an account of action-guidingness that allows us to say that some judgments or concepts can be action-guiding even if they leave

unspecified (as in this case) who has to do what on an individual level. I do not think this line of argument is impossible (I am even tempted to say this is true), but like I said before I think pursuing this line of argument is likely to lead us into a difficult-to-resolve dispute over what the 'correct' account of action-guidingness is, and I think this attraction is best avoided.

Instead, I think a more promising response to O'Neill is to say that it is distracting to overthink whether these demands are 'action-guiding' in that rather strong sense of the notion which I think she prefers, or that whether there are other conceptions of action-guidingness that is weaker and will allow me to say that my account is, actually, action-guiding. What I think is most important is our recognition that even if these welfare-human-rights-backed demands are not action-guiding, we can still make sense of the way in which they *can be* normatively significant, or empowering; and that, I think, is the most convincing way to defend welfare human rights. Let me reiterate: I claim that these welfare-human-rights-backed demands *are* normatively significant; and despite the difficulties we initially contemplated, the way that they are normatively significant is that they are capable of reason-giving in a robust sense even when the demands in question are made against a vague collection of agents. It is true that these demands fall short of being, strictly speaking, action-guiding; nonetheless they are, as I have been arguing for in this section, capable of robust reason-giving. As I have illustrated, I think it is a mistake to insist that unless these demands can be action-guiding in the very strong sense of the notion, they are *empty*, or worse, a mockery. This is extremely counter-intuitive—in the same way that we should find the judgment that Bob in our previous example failing to robustly give the bystanders reasons to save him counter-intuitive.

Let me wrap things up in this subsection by recounting the long path we have taken in order to answer O'Neill's worry. At the beginning of this chapter, we have seen that one of her most forceful and famous lines against welfare human rights is that

they are empty, mere rhetorics, and they can be a bitter mockery to the poor and needy, because insisting that the poor and needy are holders of welfare human rights that do not have specific corresponding duty bearers amounts to an empty pledge. But I find this very difficult to accept, and my arguments immediately above can serve to explain why I find this claim problematic. This claim is problematic because it fails to appreciate the fact that there *are* important things that welfare human rights do, putting aside the problem of action-guidingness. These rights *are* capable of backing up the demands of their holders, and these demands are normatively significant because they are robustly reason-giving. It is true that these demands are not 'action-guiding' in the way that would satisfy O'Neill, but it seems to me to be no less a mockery to the poor and needy if it turns out to be impossible for them to even make a rights-backed demand about their basic provisions against some not-too-definite collection of agents who are thereby given a reason or some reasons, in a robust way, to do something about their human rights. Just as we wouldn't want to jump from the mere fact that the collection of agents who make up the 'bystanders' outside Bob's flat are vague and lacking in a decision-making procedure to the conclusion that Bob doesn't have a right to to be saved, it is equally counter-intuitive to conclude that, given the 'west' or 'the rich' share a similar character in their composition, the poor and needy are being mocked by being conceived of as rights holders.

7 Upsetting the Hohfeldian table: Reloaded

In the introduction, I have promised a return to my scepticism towards the Hohfeldian analysis in the rights literature. I think we are now in a good position to finish the last point I made in Section 4 in the Introduction. But first, a bit of stock-taking.

Recall the argument presented in the Introduction. I argued that it can be misleading

and counter-productive to stick to the conventional way of talking about rights—the Hohfeldian analysis, that is—as the literature on rights has done in its recent history. My objection was threefold. The first criticism is that doing so encourages us to ask questions that do not necessarily help our understanding of rights (not claim-rights, I must stress, which is itself a piece of Hohfeldian jargon) in any straightforward way; essentially, this is a complaint that siding with the Hohfeldian analysis, with its majestic and intricate system, risks leading us astray. To paraphrase Raymond Geuss (2009, p.60), the Hohfeldian analysis is like an intricate system that, once you’ve got close enough, will entice you ever closer with no prospect of victory or escape; the best strategy is to observe it from a distance and reject it from the outset.⁹⁶ And this is complemented by the second criticism I offered, which states that it is not clear, actually, how the Hohfeldian analysis is useful if at all: relying on Cruft’s argument elsewhere, I have called into question the relationship between Hohfeldian incidents and rights. If, following Cruft’s line, there is no one Hohfeldian incident that all rights must have, and that not all Hohfeldian incidents can constitute rights, the point of talking about rights *via* the Hohfeldian language becomes unclear. We might end up with a huge literature on Hohfeldian incidents (as we definitely do now), but remain none the wiser when facing the ultimate question of understanding rights (which, sadly, also seems to be the case). This certainly can’t be where we want to go. (Unless, of course, one thinks there is some intrinsic value in conducting the Hohfeldian analysis irrespective of how it helps us understand rights—which I take to be an incomprehensible and indefensible position. I can see this assertion I make might raise some eyebrows, but this debate will have to happen somewhere else.)

However, one further objection, which had not been fully articulated back in the Introduction, remains, and this third objection is markedly different from the first

⁹⁶ Geuss’s own point is made against Kant.

two criticisms in an interesting way. Note that the previous two criticisms leave unchallenged the assumption that all rights can, indeed, be talked about in a Hohfeldian way. That is, the first two criticisms still operate with the assumption (or at least do not actively seek to find fault with it) that all rights are some combination(s) of Hohfeldian incidents. This assumption, while rarely explicitly spelt out, I think is rather popular. (For example, Jones's conclusion on his exposition of the four 'forms' of rights—i.e. claim-rights, liberty-rights, powers, and immunities—comes quite close to an outright endorsement of this presumption (1994, p.25).) The last criticism which I am going to expand presently is meant to be a direct challenge against this assumption. In the Introduction, I merely highlighted the possibility of this assumption being false. Now is the time to see whether we can get any more concrete than that.

I left the filling out of the details of this criticism until now because one way of looking at what I have done in Chapter 5 (and, less directly, Sections 8 & 9 of Chapter 2) is to see it as a concrete example which challenges the aforementioned assumption. That is to say, my argument in Chapter 5 can be read as a demonstration of why a Hohfeldian analysis of rights might be problematic: this way of thinking about rights can't, really, explain welfare human rights as I have just argued.

Let me try to pinpoint the problem as I see it more precisely. I think a Hohfeldian analysis of rights has an implication or constraint on our thinking about rights that is, in light of what we have discussed in the current chapter—especially in Section 6, somewhat untenable. The implication or constraint I refer to is that a Hohfeldian analysis of rights dictates that rights are always held against specific someone(s). How so? Recall how we defined the first-order Hohfeldian incidents in the first place. Claims, liberties, duties, and no-claim are *all* understood, exclusively, as the normative relationships that A and B have regarding action ϕ . Second-order

incidents are then in turn understood via the first-order incidents. This, I think quite straightforwardly, entails that all rights must also be a relationship between A, B and ϕ . That is because if we grant the supposition that all rights can be captured by the Hohfeldian language (i.e. that no rights falls outside the Hohfeldian analysis), it is unclear to me how there can ever be a right that does not fit into this idea of a three-way relationship among A, B and ϕ .⁹⁷

The following move is then the crux: *my defence of welfare human rights seems to be a kind of understanding of rights that defies this Hohfeldian constraint*. It is so because it is not clear how the demand-function I have been discussing is explained by the Hohfeldian language, or even allowed by it. It is not clear, if a human right holder can make authorized, rights-backed demands against some vague collection of agents, how this relationship is to be cashed out in terms of Hohfeldian incidents. The most obvious difficulty is with the constraint on A and B that I suggest a Hohfeldian analysis imposes. If one were to read demands as *genuinely open* (in the way it is talked about in Chapter 2), the mismatch is clear: the demand function, unlike the Hohfeldian incidents, is not straightforwardly about the relationship between some A and some B regarding some action ϕ . There is, in other words, no 'B'.⁹⁸

There will, of course, be ways to tweak the understanding of my characterisation of the demand-function of welfare human rights such that it should sit a lot more

⁹⁷ In a sense, again, this suggestion not entirely new. Cf. Cruft (2012); there he explores the possibility that human rights might have to be understood as non-Hohfeldian rights. His arguments are somewhat different, and I will not discuss them here.

⁹⁸ Note this strategy of challenging the assumption that *all* instances of rights are explicable in Hohfeldian terms must be taken seriously, even by the staunchest defender of this assumption. Wenar makes it very explicit that his confidence in this axiom is 'inductive'. Cf his (2005), especially pp.235-236.

comfortably with a Hohfeldian system. For example, one might want to explain away the vagueness regarding the collection of agents to whom the demands can be made, to the extent that we can once again use the ‘B’ in the Hohfeldian analysis to denote the addressee of the demand. I see this move as motivated by a desire to reconcile what I have said with the Hohfeldians—a desire I do not share. This route is, of course, open to be pursued, but I will not attempt it here. In any case, my ultimate goal in this chapter is not to argue against Hohfeld. I am content to have cast doubt over O’Neill’s argument. Whether this can also be used against a Hohfeldian analysis of rights is a further implication that does not affect the central point I want to put forward.⁹⁹

Note too that even if one finds suspicious my argument inadequate, my adverse feeling about the Hohfeldian analysis might still have its bite, albeit with a slight modification: the Hohfeldian analysis doesn’t even allow the possibility of my proposal to get off the ground in the first place. What I have been arguing for as a preferred way of looking at welfare human rights, even if one finds it wrong, cannot be articulated in a Hohfeldian language. I think this is a rather strong reason for us to be sceptical about the pervasiveness of the Hohfeldian analysis: it prevents some meaningful discussions to be had about rights. Surely, whatever reason one might have in disagreeing with this chapter, ‘that Hohfeld wouldn’t allow’ cannot be taken as a serious objection. But if we had begun with Hohfeld at the outset, I am not sure how this chapter would have been possible in the first place. I think this, perhaps, is the strongest argument in favour of my reservation all along in avoiding the

⁹⁹ It has been suggested to me that perhaps, under my view, only something *very much like* a Hohfeldian claim can back and authorize demands. I am not sure whether that is true. That comes close to denying what I have been claiming in Sections 6-7 (and in particular 7.3). I do not think that my view of rights conforms to the Hohfeldian assumption that rights must be relations between two persons or parties in a clear and straightforward way, but this suggestion pushes my view closer to this assumption.

Hohfeldian language as much as I possibly could. Again, I see no reason for us to make ourselves slaves to the Hohfeldian master.

8 Conclusion

In this Chapter, I have argued how my view of rights has some interesting implications for the contemporary discussion of human rights. I begin by explaining what O'Neill's famous objection to welfare human rights is, and what fundamentally drives her worry (see Section 1-2). The worry, simply put, is that it is unclear to her what point there is in talking about welfare human rights, when it is unclear *who* has to do *what* in relation to these rights. In Section 3, I argued that O'Neill's concern should be framed as a worry over the *action-guidingness* of rights, to the extent that O'Neill holds action-guidingness as a necessary condition for the existence of rights. In Section 4, I argued that it is a failure to appreciate this root of O'Neill's worry that makes the existing attempts to address her worry unsuccessful in the literature.

In Section 5, I outlined my own reply to O'Neill. Following our conclusion from Chapter 4, where we looked at why it is natural to think that there is more than one single thing that rights do, I propose that we should focus on thinking about how welfare human rights can perform the demand-function. I argued that if it can, then it shows that there are indeed something else that welfare human rights do, and O'Neill's insistence that welfare human rights cannot exist simply because they cannot guide actions cannot be sustained. I also ruled out a simple rejection of O'Neill's critique by simply relying on the thought that rights do more than one thing, because friends of O'Neill might at that point shift their focus to claiming that all *human* rights must be action-guiding, despite rights, in general, have many functions. To respond to this more sophisticated backing of O'Neill's argument, a more convincing way to advance is to show that welfare human rights do in fact perform the demand-function.

In Section 6, I explored how it is that welfare human rights can perform the demand-function. There are indeed some complexities that is peculiar to welfare human rights when it comes to the demand-function, but I concluded that they can be overcome, and that it is entirely plausible for us to maintain that welfare human rights are capable of backing up and authorizing demands made against a collection of agents that is not entirely specific on identities.

Eventually my reply to O'Neill *isn't* that claimability and action-guidingness are unimportant features of rights, it is just they are not the *only point* of rights; welfare human rights, failing on both of these counts, still do something important.¹⁰⁰

In Section 7, I have also explained why my view could be seen as a challenge against the Hohfeldian analysis of rights, in that it is not clear whether the Hohfeldian language can accommodate my view because of some inherent constraints that the Hohfeldian analysis imposes on the discussion of rights.

¹⁰⁰ This might be a good point to address another methodological point about my overall argument. The suggestion I want to reject as part of what I am defending is that for *every* right, the holder of the right is enabled by the right to make claims or demands on others in a normatively significant way. This function, I think, can't be one shared by all rights because the demand-function of rights faces a very similar problem that the will theorists face: accounting for the rights of those who lack certain agency power. In my case, those who are incapable of making any demands whatsoever; in the will theorists' case, those who aren't capable of waiving or demanding enforcement of one's right.

Conclusion & Further Questions

The overall aim of this thesis has been to further the existing discussion concerning the relationship between theories of rights and the concept of demand. While it should be recognised that there had been evident development in this direction in the recent past, the substantive views put forward under the label of ‘demand theory’ had been somewhat wanting. My wish is to get us back onto the right course.

In Part I of the thesis, I have defended a philosophical view of rights that stresses the importance of demands. In a much cited but surprisingly ‘under-extracted’ article, Feinberg has given us a prototype of a view that gives the notion of demands its proper attention. In that spirit, this thesis is devoted to making the following claim plausible: Rights, I submit, enable their holders to make what I called rights-backed, authorized demands; it is a point that, I claim, no thorough analysis of rights can afford to ignore. One way to understand the normative importance of these rights-backed, authorized demands is to look at how, when a right holder makes these demands, the very making of them is ‘reason-giving’ for others. Following Enoch, I argue that they are reason-giving in a ‘robust way’ (as opposed to in a ‘epistemic way’ or a ‘merely-triggering way’), and thereby marking them out as special.

I have also argued that demands are ‘open’ regarding who stands on the receiving end of any instance of a demand; it is entirely natural for us to accept this claim once we have reflected upon our ordinary usages of the word. This, I argued, will have interesting implications when we think about some issues in the philosophical discussions of human rights.

Towards the end of Part I, I contrasted my view with that of Darwall’s and Skorupski’s. I have chosen to focus on them because they are most obviously the

rightful claimants to the title of demand theorists of rights, and have been recognised as such in the literature. I concluded that despite the apparent similarity, my view and theirs are quite different: the most important difference of all is that I had no wish to defend a *complete theory*, in the sense of a theory which attempts to unpack everything about rights *via* demands. I think to defend a complete demand theory of rights is a mistake, and my reasons for thinking so are detailed in Chapter 3. I am keen to avoid the same mistake; therefore I am explicit about the relatively modest scope of my proposal, and I remain content that I have in mind a *partial* theory of rights.

Part II explains where I stand in the debate over rights. Much of Part II is devoted to pinning down precisely what the state of the current debate is: it is my view that despite an apparent consensus, it is in fact unclear what the dominant camps in the contemporary literature on rights—i.e. the will theory and demand theory—disagree over. Having proposed a way to reconcile the different readings of the point of the debate, I offered a modest contribution that my view can make: that enabling their holders to make rights-backed, authorized demands must be one of the functions rights have.

Part III looks at some implications my view has on the contemporary literature on human rights. I focused on an influential argument put forward by O'Neill, who argues that welfare human rights cannot be genuine rights because, in the absence of any institutional set up, they are not 'claimable'. I reviewed a number of replies against O'Neill on this point and argued that they all fail to get to the bottom of O'Neill's concern, which is pointedly about the implications unclaimable rights have on *practical reasoning* and *action-guidingness*.

Instead, I proposed a more plausible way to address O'Neill's concern is to 'bypass' it: i.e. to question the assumption that rights have to be action-guiding in the first place.

My view, which focuses on the relationship between rights and demands, complements this proposal, in that it states something that human welfare rights do *independently of* their being action-guiding. I think this is a defence that moves the discussion forward in an interesting way, in that it transcends the debate over whether human welfare rights are, really, action-guiding.

I concluded Part III by offering a brief defence of the demand-enabling function of human welfare rights. I first reiterated the idea that demands, including those backed up and authorized by welfare human rights, are *open*: meaning there is no difficulty in cases where the addressees of these welfare-rights-backed demands are not ‘specified’—precisely the sort of scenario that worries O’Neill. Furthermore, I argue that it shouldn’t be worrying to say that these welfare-human-rights-backed demands are indeed reason-giving robustly in a special way. All this, I think, gives us a new way to look at what point there is to having a human right.

An additional implication of my argument is that it may call into question our confidence in the so-called Hohfeldian analysis of rights. My understanding of rights enabling rights-backed, authorized demands, I submit, is *ruled out* by a Hohfeldian analysis from the outset, given its implicit assumption that contradicts the *openness* of rights-backed, authorized demands. This has the potential of shifting the very language we use to talk about rights profoundly.

Further questions

Finally, allow me to address some further questions which were set aside. The most obvious one perhaps is whether I have more to say about what a *complete* theory of rights should look like, given that is *the* ultimate goal of all theories of right. (Cf. the discussion in Section 4.3, Chapter 4.)

Unfortunately the methodology I committed myself to bars an easy answer to this question; once we have subscribed to a view that is comfortable with rights having more than one ‘function’, one needs to be confident about the exhaustiveness of one’s list of functions of rights before one can declare the work done. I do not see any theoretical considerations preventing this from ever happening, but to speculate on whether it will happen, or how many functions there will be eventually, or what these functions should look like, before we have done the relevant research and analysis is, I fear, premature. At best, I could offer an abstract and formal answer to this question. Suppose F represents any one function that rights have, then a complete theory of rights ought to look like this:

Anything that serves $F_1, F_2...$ and/or F_n is a right.

Unless we have some strong reason to think that ‘ n ’ is going to be infinite, or that its value can never be known, I do not think the quest for a complete theory of rights is in principle doomed. However, it is certainly beyond the scope of this project to provide further clues as to the value of ‘ n ’, or a concrete account of what lies between F_1 and F_n .

As to whether there is anything that ties members of $F_1...F_n$ together, a preliminary answer has already been offered in Section 4.3, Chapter 4, but let me briefly elaborate. Earlier I argued that were one to endorse the view that rights have more than one function, a story that one can offer in explaining the diversity of functions and how they hang together is to appeal to the historical development of the idea of rights. This will imply that in accounting for how rights’ different functions all come to fall under a single concept, intellectual history is the answer. Yet one might think more must be offered. One might insist that even if we had consigned the task of uncovering the link among $F_1...F_n$ to intellectual history, there *has to be* some ‘principled’ connections among them. I want to caution against such a view: for all

we know, the way these different functions of rights hang together may be similar to, in a Wittgensteinian way, how members of a family resemble each other. Members of a family may share no single common trace or feature, but there should be enough 'similarities, overlapping and crisscrossing' to tie the whole family together when we view them as a whole. Similarly, once we have all the functions of rights uncovered in front of us, we might be able to spot how all these functions hang together. But that does not mean that there must be a particular feature that all these functions share, or that there are some principles governing what these functions are. To paraphrase Wittgenstein: 'don't say, "there must be something common, or they would not be called functions of rights", but *look and see* whether there is anything common to all' (Wittgenstein, 1958, p.31). Indeed, I would even go so far as to defend 'Don't think, but look!' is in general good Wittgensteinian advice when it comes to genealogy of moral concepts.

One can indeed say a lot more about rights and demands, and how such discussions may lead to a full-fledged theory of rights. But I hope I have achieved the predefined aim of this thesis of pushing the analysis of demands back into the central stage and suggested how theorists of rights may benefit from, as I have done, paying more attention to the concept of demand.

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